(16,655.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 154.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES DE LACEY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 Be it remembered that on the 18th day of April, 1893, there was duly filed in said circuit court of the United States for the district of Washington, western division, a bill of complaint in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant. } No. —.

Complaint.

The plaintiff, Northern Pacific Railroad Company, a corporation duly organized and existing under and by virtue of an act of Congress of the United States of America, approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," complains of the defendant James De Lacey, a citizen and resident of the State of Washington, and for cause of complaint says:

I.

2 That the plaintiff is the owner of and entitled to immediate possession of the following-described lands, to wit: The southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter and the east half of the southwest quarter of section twenty-one, township twenty north, range three east of Willamette meridian, in Pierce county, State of Washington, which said lands are of great value, to wit, of the value of twenty thousand dollars and more.

II.

And the plaintiff says that the defendant, without the permission of plaintiff and without any color of title thereto, has unlawfully and wrongfully entered upon said above-described lands and now unlawfully and wrongfully withholds possession of said lands from the plaintiff to the great damage of plaintiff.

Wherefore plaintiff demands judgment for the possession of said above-described lands and for — dollars damages for the withholding of the same from plaintiff, together with its costs and disbursements herein.

ASHTON & CHAPMAN,
Attorneys for Plaintiff.

F. M. DUDLEY, *Of Counsel.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

Paul Schulze, being first duly sworn, on oath deposes and says that he is the general land agent of The Northern Pacific
3 Railroad Company, the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that he believes the same to be true.

PAUL SCHULZE.

Subscribed and sworn to before me this 18th day of April, 1893.

[NOTARIAL SEAL.] W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

Filed April 18, 1893.

A. REEVES AYRES, *Clerk,*
By CLARA M. KENT, *Deputy.*

And afterwards, to wit, on the 18th day of April, 1893, there was duly issued out of said court a summons in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs.
JAMES DE LACY, Defendant. }

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city of Tacoma, Pierce county, State of Washington.

Summons.

The President of the United States of America to James De Lacey, Greeting:

4 You are hereby required to appear in the circuit court of the United States, ninth judicial circuit, district of Washington, western division, at the city of Tacoma, within twenty days after the day of service of this summons upon you, if served in said county of Pierce; or if served in any other county, then within thirty days after the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you. And unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 18th day of April, in the year of our Lord one thou-

sand eight hundred and ninety-three, and of our Independence the 117th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By CLARA M. KENT,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within writ on the 18th day of April, 1893, and personally served the same on the 18th day of April, 1893, by delivering to and leaving with James De Lacey, said defendant named therein, personally, at his place of
5 residence, near Fern Hill, county of Pierce in said district, together with a copy of the complaint attached thereto.

THOS. R. BROWN,
U. S. Marshal,
By D. G. LOVELL, *Deputy.*

Marshal's Fees.

Serving summons and complaint.....	$4 00
Mileage	48
	$4 48

(Endorsed:) Filed April 8th, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 8th day of May, 1893, there was duly filed in said court, in said cause, a demurrer to complaint in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, }
vs. } No. —.
JAMES DE LACEY, Defendant. }

Demurrer to Complaint.

Now comes the defendant, James De Lacey, and demurs to the complaint of plaintiff in above cause, for the following reasons, to wit:

6 1st. That the complaint does not state facts sufficient to constitute a cause of action.

Dated April 19th, 1893.

BALLARD & NORRIS,
Attorneys for Defendant, Room 204 *Cal. Block,*
Tacoma, Washington.

I, H. F. Norris, one of the attorneys for the above-named defendant, hereby certify that in my opinion the above demurrer to plain-

tiff's complaint in said above cause is well founded in point of law.

Witness my signature this 19th day of April, 1893, at Tacoma, Wash.

H. F. NORRIS,
Attorney for Defendant.

Filed May 8, 1893.

A. REEVES AYRES, *Clerk*,
By CLARA M. KENT.

And afterwards, to wit, on Wednesday, the 17th day of May, 1893, the same being the 32nd judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order Overruling Demurrer.

This cause coming on to be heard on the demurrer of the defendant to the complaint, the court having heard the arguments of counsel and being fully advised in the premises—

7 It is ordered that said demurrer be, and the same is hereby, overruled; and the defendant is given 30 days in which to answer.

And afterwards, to wit, on the 16th day of June, 1893, there was duly filed in said court, in said cause, an answer in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACY, Defendant. } No. —.

Answer.

Now comes the defendant, James De Lacy, and files this, his answer, to the complaint of the plaintiff, herein, and for his answer charges and avers:

First.

Defendant admits the corporate capacity of the plaintiff as stated in said complaint; and that defendant is a citizen and resident of the State of Washington, and in Pierce county, said State.

Second.

The defendant denies that the plaintiff is the legal or equi-
8 table owner of the land described in the first paragraph of said complaint, and denies that the plaintiff is entitled to the

possession of said land, or any part thereof; and defendant admits that said premises are of the value of twenty thousand dollars, ($20,000.00) and more, to wit, the sum of one hundred thousand dollars ($100,000.00).

Third.

Defendant admits that defendant is in possession of the land described in said first paragraph of plaintiff's said complaint, that he went into possession of same in April, 1886, without permission of plaintiff, but denies that he is in possession of said premises without color of title thereto; denies that defendant unlawfully and wrongfully entered upon said premises and denies that defendant now unlawfully and wrongfully withholds possession of said lands from the plaintiff, to the damage of said plaintiff, or otherwise.

Fourth.

Defendant denies that plaintiff is entitled to judgment for the possession of said described lands, or for damages in the sum of — dollars.

Fifth.

Stricken.

Defendant admits the land-grant act of Congress of July 2nd, 1894, under which the plaintiff, as a railroad company, claims ownership to the lands in controversy, to wit:

9 The east one-half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one, in township numbered twenty north of range numbered three east of the Willamette meridian, according to the United States Government survey.

Stricken.

And avers that the said land is embraced within the grant and within the withdrawal issued by the Land Department under said grant, and avers that said described lands were excluded from the grant by reason of a pre-emption filing thereon, made April 9th, 1869, by John Flett by his D. S. 1227, which said filing remained upon the records of the Land Department at Washington, D. C., undetermined and uncanceled, a *prima facie* good and valid pre-emption filing at the date of withdrawal on general route, to wit, on August 13th, 1870, and at the date of the filing of the map of definite location, to wit, on May 14th, 1874, and that by reason of such fact said land was excepted from the operation of said grant, and plaintiff obtained no title or interest in or to said land, and had not, at the commencement of this action, any right, title, or interest in said land, either in law or equity.

And defendant, for a further answer to the complaint of the plaintiff, herein, and for his affirmative defense to said complaint, charges and avers:

I.

That on April 9th, 1869, one John Flett, a citizen of the
10 United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement as required by law, filed his pre-emption declaratory statement, numbered 1227, for the east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one, in township numbered twenty, north of range numbered three, east of the Willamette meridian, according to United States Government survey, alleging settlement on said land as of April 7th, 1869.

That on said date, to wit, April 7th, 1869, said land was unoffered land situated in Pierce county, then Territory, now State of Washington, and in the land district of public lands, subject to sale and entry, at the land office at Olympia, Washington Territory.

That said declaratory filing was legally and properly made, the fees required by law paid, and receipt and certificate then and there issued to said John Flett, dated April 9th, 1869, and said pre-emption entry was, by the proper officers at said land office, allowed, entered upon the records and plats of the local land office at Olympia, W. T., duly reported to the General Land Office of the United States at Washington, District of Columbia, and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this his affirmative defense.

II.

That under the aforesaid declaratory statement, No. 1227,
11 the said John Flett improved and occupied said land until the year 1871.. That in the fall of 1870 said John Flett attempted to make his final proof under said filing, and was refused by the local land office at Olympia, for the alleged reason that said land was within the grant of July 2nd, 1864, to said plaintiff, The Northern Pacific Railroad Company.

III.

Stricken. That subsequently, to wit, July 15th, 1887, such further proceedings were had under said declaratory statement No. 1227, of said John Flett that notice of intention to present final proof was made by the local land office at Olympia.

IV.

Stricken. That in 1883 one John Algyr made application to file upon said land as public land and tendered a declaratory statement, sworn to, as required by law, and tendered the proper fees at said local land office at Olympia, W. T., which was refused by the officers of said local land office, and said John Algyr appealed, all of which facts appear of record in the General Land Office at Washington, D. C., to which records reference is hereby made.

V.

That subsequently, to wit, on and prior to April 9th, 1886, James De Lacy, this defendant, being at the time a resident upon said land, over the age of 21 years, having his wife and family present with him, and having filed his declaration of intention to become
12 a citizen of the United States, and being a qualified pre-emptor, did, on said day, to said local land office at Olympia, Territory, now State, of Washington, the same being the proper land office for the land district within which said land is situated, and said James De Lacy, being then and there legally entitled to make homestead entry of said land under the laws of the United States, having previously made settlement thereon, offered to make homestead filing on said land as unoccupied public land subject to pre-emption and homestead entry, and tendered his written statement in form as required by law, the same being duly and properly sworn to, together with all proper and legal fees of said land office for such complete filing and entry, all of which was refused by said local land office and was so refused by the local officers of said land office, for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company, of date July 2nd, 1884, and said James De Lacy, this defendant, appealed to the General Land Office at Washington, D. C., all of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is hereby made.

VI.

Stricken.

That the said James De Lacy, this defendant, entered his protest and contest of all claims of said John Flett and John Algyr under the D. S. 1227, of said John Flett, and the attempted filing of John Algyr, all of which appears of record in the said General Land Office, to which reference is here made.

13 VII.

That said John Flett, never having made final proof under said D. S., 1227, and never having resided upon or improved said land since 1871, forfeited all rights to make such final proof, and said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9th, 1869, pending contest in the local and General Land Office of the United States, until December 23rd, 1891, when same was, for the first and only time, canceled of record and in fact, all of which appears in the records of the General Land Office, and to which records a reference is now made.

VIII.

That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States granting lands to the said plaintiff to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound in Washington Territory, by the northern route'

approved July 2nd, 1864, plaintiff claiming that said land, hereinbefore described, were within the scope of said grant, and conveyed to plaintiff thereby. That in truth and in fact the act if Congress of May 31st, 1870, declared the line of said railroad along the valley of the Columbia river to Portland, Oregon, thence to Puget sound (at Tacoma), to be the main line of said Northern Pacific railroad under said grant.

Stricken.

IX.

That the map of general route of said main line was filed
14 and order of withdrawal issued by the Land Department of the United States, as provided in said grant, on August 30th, 1870, at which time the pre-emption filing of said John Flett, D. S., No. 1227, was a valid pre-emption filing upon said — hereinbefore described, as shown by the record books and plats of the General Land Office of the U. S., to which books, records and plats reference is made, and said filing—D. S., No. 1227—was then a legal, valid, uncanceled pre-emption claim to said lands, and, as defendant avers, excepted said land from the operation of said grant.

X.

That the line of definite location of said main line of said railroad was filed, as provided by said act, on May 14th, 1874, and that said line was embraced within the limits of withdrawal of August 13th, 1870, and within the limits of map of definite location (route) of May 14th, 1874, of the main line of said railroad, and on said dates the pre-emption filing of said John Flett—D. S., No. 1227—was a legal, valid, existing and uncanceled pre-emption claim as record- in the General Land Office of the United States, and reference is made to such records and plats; and as defendant avers, such uncanceled pre-emption claim excluded said lands from said grant as definitely located on said main line of said railroad.

XI.

That at all times since April 9th, 1869 (and which was prior to map of general route of plaintiff's main and branch lines of said railroad, under said act of Congress of July 2nd, 1864), the aforesaid pre-emption filing of said John Flett—D. S.,
15 No. 1227—has been a legal, valid, uncanceled, pre-emption claim, of record in General Land Office at Washington, D. C., until canceled on December 23rd, 1891.

Stricken.

That the Land Department recognized the validity thereof and the rights of said John Flett thereunder; and that plaintiff, The Northern Pacific Railroad Company, for the first time, in June 16th, 1897, made formal claim to and entered protest and contest therefor, and on the final hearing of said contest in United States land office the receiver made a finding of facts, and as a conclusion of law determined in favor of said John Flett under said D. S., No. 1227, and ordered that he make his final proof under the law, and on his failure so to do that said land be

Stricken.

awarded to James De Lacy, this defendant, under his homestead claim. This opinion was entered July 27th, 1889, and now appears of record in the General Land Office at Washington, D. C., to which reference is made.

XII.

Stricken.

That on appeal from the aforesaid ruling of the local land office to the Commissioner of the General Land Office, all parties being represented, said Commissioner made a finding of facts from the evidence, and as his conclusion of law finds that said John Flett is entitled, under his aforesaid declaratory filing No. 1227, to make final proof and receive patent
16 from the department for said aforesaid land; that said opinion of Honorable Lewis A. Groff, Commissioner of the General Land Office, was filed December 5th, 1889, as shown by the records of the General Land Office at Washington, D. C., to which a reference is here made.

XIII.

Stricken.

That under said act of Congress of July 2nd, 1864, all lands to which the homestead, pre-emption, or other claims had attached, at the date of general withdrawal—August 13th, 1870—was excluded from said grant to plaintiff, and by the provisions of said grant said plaintiff, The Northern Pacific Railroad Company, was entitled to select lands in lieu thereof out of certain other lands, as therein provided, and defendant avers and charges the fact to be that the plaintiff, well knowing the facts from the records of the General Land Office, treated the lands in controversy as Government lands sold, as excluded from said grant, and so advertised same on all their official land maps under said grant, and on information and belief charge that said plaintiff, Northern Pacific Railroad Company, did file claim for lieu lands instead thereof, and that the same were selected, and the selection approved by the Land Department of the United States; all of which appears on said official map of said railroad company, and upon the records of the Land Department in the General Land Office in Washington, D. C., to which records and maps reference is made.

17 XIV.

That said land in controversy in this suit was and is within the limit of the grant on main line of plaintiff's railroad, as declared by act of Congress of May 31st, 1870, and that said lands have been occupied by this defendant and his family, as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement, in April 9th, 1886; that defendant has cleared, grubbed out, and cultivated portions of said land; that the land is good agricultural land, and productive for agricultural purposes; that defendant has erected, at great cost and expense, a good dwelling-house in addition to his first house erected

thereon, in which defendant and family now reside; that defendant's improvements upon said land, made by him thereon for the use of himself and family, and in the improvement and betterment of said land, has cost him, and are of the value of seven thousand dollars ($7,000.00); that by reason of the defendant's occupancy and the cultivation of said lands, and the growth of the country surrounding, and especially the growth of the city of Tacoma, near which city said land is situated, said lands have increased in value from about sixteen hundred ($1,600.00), at the time defendant made his settlement and claimed his homestead right thereon, to about the *some* of one hundred *dollars* dollars ($100,000.00), the present value thereof.

XV.

That defendant, on or about the 29th day of April, 1892, went to the local land office at Olympia, Washington, he having at
18 that time constantly resided upon said land (claiming the same as his homestead under the law, and his aforesaid offering to make his said entry and filing thereon), and improved and cultivated same for more than five years, as is provided by the homestead laws in force, and demanded the register and receiver of said local land office to issue the notice provided by law fixing the time and place where defendant should produce his witnesses to make final proof, which was refused, for the alleged reason that the said land was covered by the aforesaid land grant.

XVI.

That on the 29th day of April, 1892, defendant went to said local land office at Olympia, Washington, and offered to make an additional and amended application for said land, setting up the additional ground that said land was within the grant of the main line fixed by act of Congress of May 31st, 1870, and of the withdrawal of August 13th, 1870, and for these reasons excluded from the grant aforesaid, and tendered the proper fee for making the homestead filing, which was refused, and defendant on the 25th day of November, 1892, gave notice of appeal from the order making such refusal to the Commissioner of the General Land Office at Washington, D. C., which appeal has not been heard by said Commissioner to the knowledge of this defendant.

Stricken.

The opinions of the register and receiver of the local
19 land office, together with findings of fact, are now on file in the General Land Office at Washington, D. C., as are also the findings made by the Commissioner of the General Land Office in his opinion, heretofore rendered, to which aforesaid opinion and findings reference is here made.

Defendant further charges and avers that on or about the 13th day of December, 1892, and pending defendant's appeal as hereinbefore pleaded, plaintiff procured to be issued to plaintiff, under said land grant, a patent, regular in form, and dated and signed December 13th, 1892, purporting to convey said land to plaintiff;

that said patent was duly recorded January 18th, 1893, in the office of the county auditor of Pierce county, Washington, in Record of Deeds, vol. —, at page —, and this defendant avers that said patent was illegally and unlawfully issued, for the aforesaid reason that said land, so intended to be conveyed thereby, was, in fact and in law, excluded from the grant aforesaid of July 2nd, 1864, and said patent, in law, is void for that reason.

That this defendant is the head of a family; is over the age of 21 years; had in 1886, and now has, the lawful right to make his homestead entry, as tendered and offered April —, 1886, when this defendant and his family entered upon, improved and claimed said land as their homestead, under the homestead laws of the United States; that at said time said land was unoccupied public land of the Government, subject to homestead entry; that defendant
20 and his family have continuously lived on said land, improving and cultivating the same up to this time; that said defendant and his family went into possession of said land peaceably, and have remained in undisturbed possession thereof until now; that defendant has made lasting and permanent improvements thereon, and that said improvements are of the value of seven thousand dollars ($7,000.00) and more; that by reason of said improvements and the growth of the country surrounding it said land is now of the value of one hundred thousand dollars ($100,000.00) and more, and this defendant alleges that he has the legal and equitable right to the possession of said premises, and the legal and equitable right to proceed and make his final proof and procure to himself a conveyance of said premises by patent under the homestead laws of the United States.

Defendant now prays a judgment and an order of this court declaring said patent to be void, and that it conveyed no title to said lands to plaintiff; that plaintiff is not entitled to said land, nor the possession thereof; that plaintiff take nothing by this suit, and that defendant have judgment for his costs in this behalf.

Defendant further prays that said patent be canceled, and that this defendant be decreed to be rightfully in possession *to* said land under his homestead claim, and for such other and further relief as defendant may be entitled.

And defendant, as in duty bound, will ever pray.

BALLARD & NORRIS,
Attorneys for Defendant.

21 STATE OF WASHINGTON, } ss:
County of Pierce, }

I, James *Le* Lacy, being duly sworn, on oath states: I am defendant in the foregoing-entitled action; that the foregoing answer to plaintiff's complaint in said suit and signed by my attorneys, Messrs. Ballard & Norris, was read over by me and is understood by me, and that the statements, averments and allegations of said answer are true, as I verily believe.

JAMES DE LACEY.

Subscribed and sworn to before me by James De Lacy this 30th day of May, 1893.

[NOTARIAL SEAL.] HOMER F. NORRIS,
Notary Public in and for said State of Washington,
Residing at Tacoma, Pierce County, Washington.

Received copy of foregoing answer this June 16th, 1893.
ASHTON & CHAPMAN,
Attorneys for Plaintiff.

Filed June 16th, 1893.
A. REEVES AYRES, *Clerk.*

And afterwards, to wit. on the 5th day of July, 1893, there was duly filed in said court, in said cause, a motion to strike in the words and figures as follows, to wit:

22 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Motion to Strike Out.

Comes now the plaintiff herein and moves the court for an order striking from the answer of the defendant certain parts and portions thereof, as follows, to wit:

I.

Granted.

Moves to strike from the fifth paragraph of said answer the following words, to wit: "Admits the land grant of Congress, of July 2, 1864, under which the plaintiff, as a railroad company, claims ownership to the lands in controversy, to wit, east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered 21, in township numbered 20 north, of range numbered 3, east of the Willamette meridian, according to the United States Government survey," for that the same is incompetent, immaterial, irrelevant, and surplusage.

23 II.

And moves to strike from the fifth paragraph the following words, to wit: "And avers that said described lands were excluded from the grant by reason of a pre-emption filing thereon, made April 9th, 1869, by John Flett by his D. S., 1227," for that the same are incompetent, immaterial, irrelevant, and surplusage, and state a conclusion of law.

III.

Granted.

And moves to strike from said fifth paragraph the words following, to wit: "Which said filing remained upon the records of the Land Department at Washington, D. C., undetermined and uncanceled, a *prima facie* good and valid pre-emption filing at the date of withdrawal on general route, to wit, on August 13, 1870, and at the date of the filing of the map of definite location, to wit, on May 14, 1874," for that the same are immaterial, incompetent, surplusage; and because as to whether or not said filing was "*prima facie* good and valid pre-emption claim," at the dates named, is a conclusion of law.

IV.

Granted.

And moves to strike from said fifth paragraph of said answer, the following words, to wit: "That by reason of such fact, said land was excepted from the operation of said grant, and plaintiff obtained no title or interest in or to said land, and had not, at the commencement of this action, any right, title, or interest in said land, either in law or equity," for that the same are incompetent and surplusage, and states a conclusion of law.

V.

And moves to strike from said first paragraph of the further answer and affirmative defense in said answer contained the following words, to wit: "That on April 9, 1869, one John Flett, a citizen of the United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement, as required by law, filed his pre-emption declaratory statement, numbered 1227, for the east half of the southwest quarter, southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section numbered twenty-one in township numbered twenty, north of range numbered three, east of the Willamette meridian (according to the United States Government survey), alleging settlement on said land as of April 7, 1869," for that the same are immaterial, irrelevant, incompetent, and surplusage.

VI.

And moves to strike from said first paragraph of said further answer and affirmative defense in said answer contained the following words, to wit: "That said declaratory filing was legally and properly made," for that the same state a conclusion of law. And further moves to strike from said paragraph the words: "The fees required by law paid, and receipt and certificate then and there issued to said John Flett, dated April 9, 1869, and said pre-emption entry was, by the proper officers at said land office, allowed, entered upon the records and plats of the local land office at Olympia, W. T., duly reported to the General Land Office

at Washington, District of Columbia, and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this, his affirmative defense," for that the same are immaterial, incompetent, and surplusage.

VII.

And moves to strike out all the second paragraph in said further answer and affirmative defense in said answer contained, for that the same is immaterial, incompetent, and surplusage.

VIII.

And moves to strike out the third paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial and surplusage.

Granted.

IX.

And moves to strike out the fourth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, and surplusage and for the further reason that whether or not said statement was sworn to as required by law is a conclusion of law.

26

X.

And moves to strike out from the fifth paragraph of said further answer and affirmative defense in said answer contained the following words, to wit: "That subsequently, to wit, on and prior to April 9, 1886, James De Lacey, this defendant, being at the time a resident upon said land, over the age of 21 years, having his wife and family present with him, and having filed his declaration of intention to become a citizen of the United States, and being a qualified pre-emptor, did, on said day, go to said local land office at Olympia, Territory (now State) of Washington, the same being the proper land office for the land district within which said land is situated, and said James De Lacey, being then and there legally entitled to make homestead entry of said land under the laws of the United States, having previously made settlement thereon, offered to make homestead filing on said land as unoccupied public land subject to pre-emption and homestead entry," for that the same is immaterial, irrelevant, and surplusage; and because that whether or not said defendant, De Lacey, was a qualified pre-emptor, or was then and there legally entitled to make homestead entry for said land, under the laws of the United States, is a conclusion of law.

XI.

And moves to strike out from said paragraph 5 of said further answer and affirmative defense the following words, to wit: "And tendered his written statement in form as required by law,
27 the same being duly and properly sworn to, together with all proper and legal fees of said land office for such complete

filing and entry," for that the same state a conclusion of law, and are immaterial, irrelevant, and surplusage. And further moves to strike out from said fifth paragraph the words: "All of which was refused by said local land office, and was so refused by the local officers of said land office for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company of date July 2, 1864," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the following words, to wit: "And said James De Lacey, this defendant, appealed to the General Land Office at Washington, D. C.," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike out the words: "All of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is here made," for that the same are immaterial, irrelevant, vague, and indefinite.

XII.

Granted. And moves to strike out the sixth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, incompetent, and surplusage.

XIII.

And moves to strike from the eighth paragraph of the further answer and affirmative defense in said answer contained the
28 words: "Forfeited all rights to make such final proof," for that the same state a conclusion of law. And moves to strike out the further words: "And said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9, 1869, pending contest in the local and General Land Offices of the United States, until December 23, 1891, when the same was, for the first and only time, canceled of record and in fact," for that the same are immaterial, irrelevant, and surplusage, and state evidentiary matter. And further moves to strike out all of said paragraph seven of said further answer and affirmative defense in said answer contained, for that the same is incompetent, irrelevant, and surplusage.

XIV.

And moves to strike from the eighth paragraph of the further answer and affirmative defense in said answer contained, the words: "That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States granting lands to the said plaintiff to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound in Washington Territory, by the northern route, approved July 2, 1864, plaintiff claiming that said

Granted. land, hereinbefore described, was within the scope of said grant, and conveyed to plaintiff thereby," for that the same are incompetent, irrelevant, and surplusage. And further moves to strike from said paragraph the following words, to wit: "That in truth and in fact the act of Congress of May 31,

Granted.

1870, declared the line of said railroad along the valley
29 of the Columbia river to Portland, Oregon, thence to Puget sound (at Tacoma), to be the main line of said Northern Pacific railroad under said grant," for that the same are irrelevant, immaterial, and surplusage, and state a conclusion of law.

XV.

And moves to strike from the ninth paragraph in said further answer and affirmative defense, in said answer contained, the words: "At which time the pre-emption filing of said John Flett, D. S., No. 1227, was a valid pre-emption filing upon said land hereinbefore described, as shown by the record books and plats of the General Land Office of the United States, to which books, records, and plats reference is made; and said filing—D. S., No. 1227—was then a legal, valid, uncanceled pre-emption claim to said lands, and, as defendant avers, excepted said land from the operation of said grant," for that the same are irrevelant, incompetent, immaterial, and surplusage, and a conclusion of law. And further moves to strike out all of said paragraph, for that the same is immaterial, irrelevant, and surplusage.

XVI.

And moves to strike out from the tenth paragraph of said further answer and affirmative defense in said answer contained the words: "And on said dates the pre-emption filing of said John Flett—D. S., No. 1227—was a legal, valid, existing, and un-
30 canceled pre-emption claim of record in the General Land Office of the United States, and reference is made to such records and plats; and, as defendant avers, such uncanceled pre-emption claim excluded said lands from said grant as definitely located on said main line of railroad," for that the same state a conclusion of law, and are immaterial, irrelevant, and surplusage. And further moves to strike out all of said paragraph, for that the same is immaterial, irrelevant, and surplusage.

XVII.

Granted.

And moves to strike from the eleventh paragraph of said further answer and affirmative defense in said answer contained the following words: "That at all times since April 9, 1869 (and which was prior to map of general route of plaintiff's main and branch lines of said railroad, under said act of Congress of July 2, 1864), the aforesaid pre-emption filing of said John Flett—D. S., No. 1227—had been a legal, valid, uncanceled pre-emption claim, of record in General Land Office at Washington, D. C., until canceled on December 23, 1891," for that the same state a conclusion of law, and are incompetent, immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "That the Land Department recognized the validity thereof and the rights of said

John Flett thereunder; and that plaintiff, The Northern Pacific Railroad Company, for the first time in June 16, 1887, made formal claim to and entered protest and contest
31 therefor," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "And on the final hearing of said contest in United States land office the receiver made a finding of facts, and as a conclusion of law determined in favor of said John Flett under said D. S. No. 1227, and ordered that he make his final proof under the law, and on his failure to do so that said land be awarded to James De Lacey, this defendant, under his homestead claim," for that the same are immaterial, irrelevant, and surplusage, and the matter therein is evidentiary in character. And further moves to strike from said paragraph the words: "This opinion was entered July 27, 1889, and now appears of record in the General Land Office at Washington, D. C., to which reference is made," for that the same are immaterial, irrelevant, and evidentiary in character.

Granted.

XVIII.

And moves to strike out the twelfth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, surplusage, and incompetent, and the matter therein is evidentiary in character.

XIX.

And moves to strike from the thirteenth paragraph of said further answer and affirmative defense in said answer
32 contained the words: "That under said act of Congress of July 2, 1864, all lands to which the homestead, pre-emption, or other claims had attached, at the date of general withdrawal—August 13, 1870—were excluded from said grant to plaintiff, and by the provisions of said grant said plaintiff, The Northern Pacific Railroad Company, was enti-led to select lands in lieu thereof out of certain other lands, as therein provided," for that the same state a conclusion of law, and are immaterial and irrelevant. And further moves to strike out the words: "And defendant avers and charges the fact to be that the plaintiff, well knowing the facts from the records of the General Land Office, treated the lands in controversy as Government lands sold and as excluded from said grant, and so advertised same on all their official land maps under said grant," for that the same are irrelevant, immaterial, and surplusage. And further moves to strike from said paragraph the words: "And on information and belief charge that said plaintiff, Northern Pacific Railroad Company, did file claim for lieu lands instead thereof, and that the same were selected and the selection approved by the Land Department of the United States; all of which appears on said official map

Granted.

of said railroad company, and upon the records of the Land Department in the General Land Office at Washington, D. C., to which records and maps reference is made," for that the same are irrelevant, immaterial, and evidentiary in
33 character. And further moves to strike out all of said paragraph 13 for that the same is immaterial, irrelevant, and surplusage.

Granted.

XX.

And moves to strike from the fourteenth paragraph of said further answer and affirmative defense in said answer contained the words: "That said land in controversy in this suit was and is within the limit of the grant on main line of plaintiff's railroad, as declared by act of Congress of May 3, 1870," for that as to whether or not the act of May 31, 1870, or any act of Congress declared a grant for said plaintiff, is a conclusion of law; and for that said allegation is irrelevant, immaterial, and surplusage. And further moves to strike from said paragraph the words: "That said lands have been occupied by this defendant and his family as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement in April 9, 1886; that said defendant has cleared, grubbed out, and cultivated portions of said land," for that the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "That defendant has erected, at great cost and expense, a good dwelling-house, in addition to his first house erected thereon, in which defendant and family now reside; that defendant's improvements upon said land, made by him thereon for the use of himself and family, and in the improvement and betterment of said land, has cost him, and are of the value of seven thousand dollars
34 ($7,000); that by reason of defendant's occupancy and cultivation of said lands and the growth of the country surrounding, and especially the growth of the city of Tacoma, near which city said land is situated, said lands have increased in value from about sixteen hundred dollars ($1,600) at the time defendant made his settlement and claimed his homestead right thereon, to about the sum of one hundred thousand dollars ($100,000), the present value thereof," for that the same are immaterial and surplusage.

XXI.

And moves to strike out the fifteenth paragraph of said further answer and affirmative defense in said answer contained, for that the same is immaterial, irrelevant, and surplusage, and the matter therein stated is evidentiary in character.

XXII.

Sentence first part of 22.

And moves to strike from the sixteenth paragraph of said further answer and affirmative defense everything up to and including the words: "The opinions of the register and receiver of the local land office, together with findings of fact, are now on file in the General Land Office at Washington, D. C., [illegible] are also the findings made by the Commissioner of the Ge[illegible]ral Land Office in his opinion, heretofore rendered, to which aforesaid opinions and findings reference is here made," for that the same is immaterial and irrelevant. And further moves
35 to strike from said paragraph the words: "And this defendant avers that said patent was illegally and unlawfully issued, for the aforesaid reason that the land so intended to be conveyed thereby was in fact and in law excluded from the grant aforesaid of July 2, 1864, and said patent in law is void for that reason," for that the same state a conclusion of law, and are immaterial and surplusage. And further moves to strike from said paragraph the words: "That this defendant is the head of a family; is over the age of 21 years; had in 1886, and now has, the lawful right to make his homestead entry, as tendered and offered April —, '86, when defendant and family entered upon, improved, and claimed said land as their homestead, under the homestead laws of the United States; that at said time said land was unoccupied public land of the Government, subject to homestead entry; that said defendant and his family have continuously lived on said land, improving and cultivating the same up to this time; that said defendant and his family went into possession of said land peaceably, and have remained in undisturbed possession thereof until now; that defendant has made lasting and permanent improvements thereon, and that said improvements are of the value of seven thousand dollars ($7,000) and more; that, by reason of said improvements and the growth of the county surrounding it, said land is now of the value of one hundred thousand dollars ($100,000) and more," for that
36 the same are immaterial, irrelevant, and surplusage. And further moves to strike from said paragraph the words: "This defendant alleges that he has the legal and equitable right to the possession of said premises, and the legal and equitable right to proceed and make his final proof and procure to himself a conveyance of said premises by patent under the homestead laws of the United States," for that the same is frivolous, in that it appears therefrom that he has not the legal right or title to the premises, and for the further reason that the same states a conclusion of law, and is immaterial, irrelevant, and surplusage.

Sentence first part of 22.

Sentence first part of 22.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

Filed July 5th, 1893.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on the 12th day of July, 1893, there was duly filed in said court in said cause an amended answer in the words and figures as follows, to wit:

37 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Amended Answer.

Now comes the defendant, James De Lacey, and, under the order of this court heretofore made, files this his amended answer to the complaint of the plaintiff herein, and for his amended answer charges and avers:

First.

Defendant admits the corporate capacity of the plaintiff as stated in said complaint, and that the defendant is a citizen and a resident of the State of Washington, and of Pierce county, said State.

Second.

The defendant denies that the plaintiff is the owner of the land described in the first paragraph of said complaint, and denies that the plaintiff is entitled to the possession of said land, or any part thereof, and defendant admits that said premises are of the value of twenty thousand ($20,000.00) dollars, and more, to wit: the sum of one hundred thousand ($100,000.00) dollars.

38 Third.

Defendant admits that he is in possession of the land described in said first paragraph of plaintiff's complaint; that he went into possession of the same in April, 1886, without permission of plaintiff, and denies that he is in possession of said premises without color of title thereto, and denies that he is unlawfully or wrongfully upon said premises, and denies that the defendant now unlawfully and wrongfully withholds possession of said land from the plaintiff, to the damage of said plaintiff or otherwise.

Fourth.

Defendant denies that plaintiff is entitled to judgment for the possession of the aforesaid lands or for damages in the sum of — dollars.

The defendant for further answer to the complaint of plaintiff herein, and for his affirmative defense herein, charges and avers:

I.

That on April 9th, 1869, one John Flett, a citizen of the United States, over the age of 21 years, and in all respects a qualified pre-emptor under the laws of Congress, having made settlement as required by law, filed his pre-emption declaratory statement, No. 1227, for the east half of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section No. twenty-one (21), township No. twenty (20), north of range No. three (3), east of the Willamette meridian, according to the Government survey, alleging settlement on said land as of April 7th, 1869.

39 That on said date, to wit, April 7th, 1869, said land was unoffered Government land, situated in Pierce county, Territory of Washington, and in the district of public lands subject to sale and entry at the United States local land office at Olympia, Washington Territory.

That said declaratory filing was legally and properly made, the fees required by law paid, and register's receipt and certificate of such entry then and there issued to said John Flett, dated April 9th, 1869, and said pre-emption entry was by the proper officers at said local land office allowed, entered upon the records, and plats of the local land office at Olympia, W. T., duly reported to the General Land Office of the United States, at Washington, D. C., and entered upon the books and plats of said General Land Office, to all of which said books, records, and plats defendant makes reference as a part of this, his affirmative defense herein.

II.

That under the aforesaid declaratory statement, No. 1227, the said John Flett occupied and improved said land and cultivated the same until the year 1871; that said John Flett attempted to make his final proof under his aforesaid filing, and was refused by the local land office at Olympia, W. T., for the alleged reason that said land was within the grant of July 2d, 1864, to the Northern Pacific Railroad Company.

III.

That subsequently, to wit, on and prior to April 9th, 1886, James De Lacey, this defendant, being over the age of 21 years and

40 having filed his declaration of intention to become a citizen of the United States, and being in all respects a qualified pre-emptor, and having made previous settlement on said land, did, on said day, go to said local land office at Olympia, Washington Territory, aforesaid, the same being the proper land office where the land district in which said land aforesaid was situated, and said James De Lacey being then and there legally entitled to make homestead entry of said land under the laws of the United States, offered to make homestead filing on said land as unoccupied public land, subject to pre-emption and homestead entry, and tendered his writ

ten statement in form as required by law, the same being duly sworn to, together with all proper and legal fees of said land office for such complete filing and entry, tendered the same to the register and receiver of said local land office, and demanded of them to make his homestead filing upon the land aforesaid, all of which was refused by said local land office, and was so refused by the register and receiver of said office for the alleged reason that said lands were within the scope of the grant from Congress to the Northern Pacific Railroad Company, of date July 2nd, 1864, and the said James De Lacey, this defendant, appealed from such order of refusal to the Commissioner of the General Land Office *of* Washington, D. C., all of which facts appear of record in the office of the Commissioner of the General Land Office at Washington, D. C., to which reference is hereby made.

IV.

That said John Flett, never having made final proof under
41 said dec. statement, No. 1227, and never having resided upon or improved said land since 1871, forfeited all his rights to make such final proof as required by law, and said pre-emption filing remained upon the records, books, and plats of the General Land Office of the United States from said April 9th, 1869, pending contests in the local and General Land Office of the United States until December 23rd, 1891, when the same was for the first and only time, canceled in fact and of record, all of which appears in the records of the General Land Office at Washington, D. C., and to which records reference is here made.

V.

That the plaintiff herein claims to own said lands by virtue of an act of Congress of the United States, granting lands to the Northern Pacific Railroad Company to aid in building a line of railroad from Duluth, in Minnesota, to the Puget sound, in Washington Territory, by the northern route, approved March 2nd, 1864, and make no other claim to said lands.

VI.

That the map of general route of the main line of said railroad company was filed July 30th, 1870, and an order of withdrawal issued by the Land Department of the United States, as provided in said grant, on August 13th, 1870, at which time the pre-emption filing of said John Flett—D. S., No. 1227, aforesaid—was a valid pre-emption filing upon said lands as hereinbefore described, as shown by the records, books, and plats of the General Land Office of the United States, to which books, records, and plats reference is here made, and said pre-emption filing aforesaid was then
42 legal, valid, uncanceled pre-emption claim to said lands, and defendant avers such filing and claim excepted said lands from the operation of said grant.

VII.

That the line of definite location of said main line of plaintiff's railroad was filed as provided by said act on July 30th, 1870, and that the lands aforesaid were embraced within the limits of the order of withdrawal of August 13th, 1870, and within the limits of definite location of route of July 30th, 1870, of the main line of said railroad, and on said dates the pre-emption filing of said John Flett aforesaid was a legal, valid, existing, and uncanceled pre-emption claim of record in the General Land Office of the United States, and was never canceled by the Land Office of the United States until in 1891, and reference is made to such record and plats in the General Land Office aforesaid. And the defendant avers that the aforesaid uncanceled pre-emption claim excluded said lands aforesaid from the said grant of July 2nd, 1864.

VIII.

That the lands in controversy in this suit, and heretofore described in the amended answer, *was* and are within the limits of the grant to plaintiff on main line of plaintiff's railroad, as declared by act of Congress of May 31st, 1870, and that said lands have been occupied by this defendant and his family as their only home under their aforesaid homestead claim; that they have resided thereon constantly since their first settlement thereon, April 9th, 1886; that defendant has cleared, grubbed, and cultivated a large portion of said
43 lands; that the lands aforesaid are good agricultural lands, and productive for agricultural purposes; that defendant has erected, at great cost and expense, a good dwelling-house and other improvements on said premises, in which defendant and family now reside; that defendant's improvements upon said lands made by him thereon, for the use of himself and family, and the improvements and betterments on said lands, have cost the defendant, and are of the value of seven thousand ($7,000.00) dollars; that by reason of defendant's occupancy, cultivation, and improvement of said lands, and the growth of the country surrounding the same, said lands have increased in value from about $1,600.00, at the time defendant made his settlement and claimed his homestead right thereon, to about the sum of one hundred thousand ($100,000.00) dollars, the present value thereof.

IX.

That the defendant, on or about the 29th day of April, 1892, went to the local land office at Olympia, Washington, he having at that time constantly resided upon said lands, claiming the same under the law as his homestead and his aforesaid offering and demand to make his aforesaid filing thereon, and having improved and cultivated the same for more than five years, as provided by the homestead laws of the United States, and demanded of the register and receiver of said local land office to issue the notice provided by law, fixing the time and place where the defendant should produce his witnesses to make his final proof under his said homestead claim,

which was refused by the officers of said local land office, for
44 the alleged reason that said lands were embraced in and covered by the aforesaid land grant.

X.

Defendant further charges and avers that on or about the 13th day of December, 1892, plaintiff procured to be issued to them, under said land grant, a patent, regular in form, dated and signed December 13th, 1892, purporting to convey said lands to plaintiff; that said patent was duly recorded January 18th, 1893, in the office of the county auditor of Pierce county, Washington, in Record of Deeds, vol. 99, at page 101, and this defendant avers that said patent was illegally and unlawfully issued, for the reason that the lands described therein, the same being the lands in controversy in this suit, *was* for the reasons hereinbefore pleaded excluded from the grant of July 2nd, 1864, aforesaid, and said patent void.

XI.

That this defendant is the head of a family, is over the age of 21 years, and in 1886 had and now has the lawful right to make his homestead entry as tendered and offered April 9th, 1886, under the homestead laws of the United States. That at said times said lands were unoccupied public lands of the United States, subject to homestead entry; that the defendant and his family made settlement upon the land aforesaid on April 9th, 1886, and have continued to live thereon continuously from said April 9th, 1886, to the present time; that said defendant and his said family went into possession of said lands lawfully and peaceably, and have remained in
45 undisturbed possession thereof until now; and this defendant alleges that he has the legal and the equitable right to the possession of said premises, and the right to make final proof under the homestead law, and procure to himself a patent from the United States to said premises.

The defendant having now fully answered, prays judgment and order of this court declaring said patent void, and canceling the same, and that plaintiff take nothing by this suit, and that this defendant is lawfully in possession of said premises, with judgment for his costs herein laid out and expended, and for such other and further order and judgment as the defendant may be entitled to herein.

BALLARD & NORRIS,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss.:
County of Pierce, }

I, James De Lacy, being first duly sworn, upon my oath state that I am the defendant named in the foregoing-entitled action; that I have read the foregoing amended answer, know and understand its contents, and said amended answer is true, as I verily believe.

JAMES DE LACEY.

Subscribed and sworn to before me this July 12th, 1893, at Tacoma, Washington.

[SEAL.] HOMER F. NORRIS,
Notary Public in and for said State of Washington;
Residence, Tacoma, Pierce County, Washington.

46 Received a copy of the foregoing amended answer this July 12th, 1893, at Tacoma, W'n.

F. M. DUDLEY,
ASHTON & CHAPMAM,
Attorneys for Plaintiff.

(Endorsement:) Filed July 12th, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 16th day of August, 1893, there was duly filed in said court, in the cause, a demurrer to affirmative defense in amended answer, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
v.
JAMES DE LACY, Defendant. } No. 193.

Demurrer to Amended Answer.

Comes now the plaintiff, Northern Pacific Railroad Company, by Ashton & Chapman, its attorneys, and demurs to the affirmative defense contained in the amended answer herein, and for
47 cause of demurrer says that said affirmative defense in said amended answer does not state facts sufficient to constitute a defense to this action.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

I, J. M. Ashton, one of the attorneys for the plaintiff in the above-entitled action, do hereby certify that in my opinion the above demurrer is well founded in point of law.

J. M. ASHTON, *Of Counsel.*

Filed August 16th, 1893.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on Tuesday, the 6th day of February, 1894, the same being the first judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

48 In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
v.
JAMES DE LACY, Defendant.

Order Making Receivers Parties.

Be it remembered that on this 6th day of February, 1894, being one of the regular court days of said court, this cause coming on for hearing on the defendant's suggestion that plaintiff company is now under direction of the U. S. courts, and in the hands of Thos. F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers, and asking that said receivers be made parties to this action for the protection of all the interests of all parties to said suit;

It is now, therefore, ordered by this court that Thos. F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of plaintiff, be made parties defendants in above suit, and ordered to appear therein and to plead herein in 20 days from this date.

To which order and direction making said receivers party defendants the plaintiff, by counsel, objected, and excepts, which exception is noted by the court.

Filed Feb'y 6th, 1894.

A. REEVES AYRES, *Clerk.*

49 And afterwards, to wit, on Monday, the 12th day of February, 1894, the same being the 6th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACY, Defendant.

Order Overruling Demurrer.

Be it remembered that on this February 12th, 1894, the same being one of the regular court days of said court, this cause coming on for hearing on plaintiff's demurrer to affirmative defense in the defendant's answer, plaintiff appeared by counsel, Ashton & Chapman, and the defendant by Ballard & Norris, attorneys, and after argument the court, being advised in the premises, overruled the said demurrer, to which ruling of the court the plaintiff at the time excepted, and exception allowed by the court.

C. H. HANFORD, *Judge.*

Filed Feb'y 12th, 1894.

A. REEVES AYRES, *Clerk.*

50 And afterwards, to wit, on the 27th day of February, 1894, there was duly filed in said court, in said cause, a reply, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Henry C. Payne, as Receivers of the Northern Pacific Railroad Company, Plaintiff-,
vs.
JAMES DE LACY, Defendant.
} No. 193.

Reply to Amended Answer.

Comes now the plaintiff, Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, as receivers of said Northern Pacific Railroad Company, having been made parties plaintiff to this action over the objection of plaintiff, and replying to the affirmative matter set up in defendant's amended answer herein, says:

1. That for a reply to the matters and things set forth in the first paragraph of said affirmative defense in said amended answer, the plaintiff, Northern Pacific Railroad Company, says that it
51 has no knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph, and therefore denies the same, and each and every part thereof, except the allegation that on the 7th day of April, 1869, the land described in said paragraph was unoffered Government land, situated in Pierce county, Washington Territory, in the district of public lands subject to sale and entry at the United States land office at Olympia, Washington Territory, which is admitted.

2. For a reply to the allegations of the second paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same, and each and every part thereof, except that the defendant admits that said John Flett was not allowed to prove up on said land.

3. For a reply to the allegations of the third paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the allegations in said third paragraph regarding the location of said land which is admitted.

4. For a reply to the allegations of the fourth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to

the truth thereof, and therefor- denies the same and each and every part thereof, except the allegation in said fourth paragraph that said John Flett had forfeited all his rights, if any he had, to
52 make final proof as required by law, which allegation is admitted.

5. For a reply to the allegations of the sixth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the allegation in said paragraph that the map of general route of plaintiff's main line of railroad was filed on July 30th, 1870, and that an order of withdrawal was issued by the Land Department of the United States on August 13th, 1870, as provided in the grant to plaintiff as alleged in said paragraph which allegation said plaintiff admits.

6. Said plaintiff denies each and every allegation contained in the seventh paragraph of said affirmative defense in said amended answer, except the allegation that the lands referred to therein were embraced within the limits of the order of withdrawal of August 13, 1870, as alleged in said paragraph, which allegation is admitted.

7. For a reply to the allegations of the eight- paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof; but said plaintiff admits that the lands in controversy are within the limits of the grant to plaintiff on main line of plaintiff's railroad, as definitely located and fixed under and by virtue of the act of Congress of July 2nd, 1864, and the acts supple-
53 mental thereto and amendatory thereof, and said plaintiff further admits that the defendant is in possession of said lands.

8. For a reply to the allegations of the ninth paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof and therefore said plaintiff denies the same and each and every part thereof.

9. For a reply to the allegations of the tenth paragraph of said affirmative defense in said amended answer, said plaintiff says that it admits that a patent for said lands was duly issued to the plaintiff and that the same has been recorded, as alleged in said tenth paragraph, and said plaintiff denies each and every other allegation in said tenth paragraph.

10. For a reply to the allegations of the eleventh paragraph of said affirmative defense in said amended answer, said plaintiff says that it denies that on the 9th day of April, 1886, said lands were unoccupied public lands of the United States, subject to entry, and as to all the other allegations contained in the eleventh paragraph of said affirmative defense in said amended answer, said plaintiff says that it has no knowledge or information sufficient to form a belief as to the truth thereof, and therefore denies the same and each and every part thereof, except the further allegation in said

eleventh paragraph that defendant is now in possession of said premises, which allegation is admitted by said plaintiff.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiff.

54 STATE OF WASHINGTON, } ss:
County of Pierce, }

Paul Schultze, being first duly sworn, on oath deposes and says that he is the general land agent of The Northern Pacific Railroad Company, the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and that he believes the same to be true.

PAUL SCHULZE.

Subscribed and sworn to before me this 26th day of February, 1894.

W. O. CHAPMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma, in said State.

(Endorsement:) Due service of within reply, by receipt of a true copy thereof, admitted this 26th day of February, 1894. Ballard & Norris, attorneys for defendant.

Filed 27th ——, 1894.

A. REEVES AYRES, *Clerk.*

And afterwards, to wit, on the 18th day of July, 1894, there was duly filed in said court, in said cause, a stipulation in the words and figures as follows, to wit:

55 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff, } No. —.
vs.
JAMES DE LACEY, Defendant. }

Stipulation Waiving Jury.

Now, on this 18th day of July, 1894, the above-entitled action coming on regularly for trial, it is stipulated and agreed by and between the parties hereto, through their respective attornevs, in open court, that said action may be tried by the court without the intervention of a jury.

Dated this 18th day of July, 1894.

F. M. DUDLEY AND
ASHTON & CHAPMAN,
Attorneys for Plaintiff.
BALLARD & NORRIS,
Attorneys for Defendant.

Due service of within stipulation by receipt of a copy thereof admitted this 19th day of July, 1894.

BALLARD & NORRIS,
Attorneys for Defendant.

(Endorsed:) Filed July 18, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, dep.

56 And afterwards, to wit, on Wednesday, the 18th day of July, 1894, the same being the 12th judicial day of the regular July term of said court—present, the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said cause, to wit:

Order of Submission.

This cause coming on for trial, F. M. Dudley, Esq., and Ashton & Chapman appearing on behalf of the plaintiff, and Messrs. Ballard & Norris for the defendant, it was thereupon stipulated between the counsel, in open court, that trial by jury should be waived, and the cause duly proceeded before the court. The testimony and arguments of counsel having been heard, the cause was taken under advisement by the court.

And afterwards, to wit, on the 13th day of September, 1894, there was duly filed in said court, in said cause, an opinion, in the words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Opinion.

Ashton & Chapman and Fred M. Dudley, for plaintiff; Ballard & Norris, for defendant.

GILBERT, *J.*:

The Northern Pacific Railroad Company brings ejectment to recover possession of 160 acres of land in section 21, township 20 north, range 3 east of the Willamette meridian, in the State of Washington.

The plaintiff claims title by virtue of the act of Congress of July 2, 1864, incorporating the Northern Pacific Railroad Company, and authorizing it to construct and maintain a railroad from a point on Lake Superior westerly, on a line north of the 45th degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main line at the most suitable place not
58 more than three hundred miles from its western terminus; also the joint resolution of May 31st, 1870, authorizing the

company to construct its main road to some point on Puget sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.

The defendant claims title and possession by virtue of a homestead entry made, or attempted to be made, by him on the 9th day of April, 1886, and he contends that the land in controversy was excepted both from the grant of July 2, 1864, and from the joint resolution of May 31, 1870, by reason of the pre-emption claim of John Flett. He alleges that John Flett filed a pre-emption declaratory statement upon this land on the 9th day of April, 1869, and occupied the same under said declaratory statement until 1871, and further states that "Flett not having resided on the land since 1871, forfeited all his right to make final proof," but that the pre-emption declaratory statement so entered in the land office by Flett remained of record therein, and was not canceled until 1891. It is the contention of the defendant that this declaratory statement of Flett, remaining of record at the time the lands granted to aid the construction of the Northern Pacific were withdrawn from settlement when the map of the general route was filed, and at the time the map of definite location was filed, operated to except the land from the grant to the Northern Pacific, under the words of the granting act as the same have been construed by the courts.

59 The land in controversy lies within the primary limits of the land grant, both of the main line of the railroad as definitely located between Portland and Puget sound, and the line of the Cascades branch as definitely located between the point where it leaves the main line and cross- the Cascade mountains to Puget sound. It has been held that the grant of lands to aid the construction of that portion of the main line between Portland and Puget sound dates from the joint resolution of May 31, 1870, and that prior to that time there was no land grant whatever in aid of the construction of that portion of the road (United States *v.* Northern Pacific Railroad Company, 152 U. S., 284), and if the title in controversy in this suit were to be determined by the rights which the railroad company acquired under the joint resolution only, the decision must be for the defendant, for it is clear that at and prior to the date of the joint resolution there was upon file in the land office a valid and subsisting pre-emption entry upon the land in controversy, which entry, being unforfeited and uncanceled, operated to except the land from the grant.

Kansas Pacific Railway *v.* Dunmeyer, 113 U. S., 629.
Bardon *v.* Northern Pacific Railroad, 145 U. S., 535.
Sioux City Land Co. *v.* Griffey, 143 U. S., 32.

But the land is, as already shown, also within the primary limits of the grant to aid the construction of the Cascades branch, and it remains to be considered how the rights of the respective parties are affected by that fact. The grant of July 2, 1864, gave land

60 in aid of the construction of a railroad across the Cascade mountains to Puget sound. That grant was not intended to

be abrogated by the joint resolution of May 31, 1870, and there is nothing in the opinion of the Supreme Court in United States *v.* Northern Pacific Railroad Company, *supra*, to the contrary. That decision goes no further than to hold that in the act of 1864 there was no land grant to aid the construction of a line between Portland and Puget sound, and nothing to show that it was the intention of Congress to connect those two points by a railroad. It must be held, therefore, that the grants to aid the construction of a line by way of the Columbia river valley to Portland, and a line across the Cascade mountains to Puget sound, took effect upon July 2, 1864, and that the joint resolution of May 31, 1870, while designating the Columbia River line as the main line, which had before been called the branch line, and naming the line across the Cascade mountains to Puget sound the branch line, which had before been the main line, did not, and was not intended to, revoke or cancel the grants in aid of those respective lines but recognized the grants as existing and remaining in force. The lands in aid of the line across the Cascade mountains to Puget sound were granted in 1864. The land in controversy in this suit was public land at that time, and it passed to the railroad company by the grant, if at the date of the definite location, to wit, on May 26, 1884, the United States had full title, or the same were not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

It is contended that the Flett pre-emption entry in the
61 land office constituted a pre-emption claim, which operated to bring the land within the exception contained in the grant, and that therefore the railroad company has no title upon which to recover. If there were no information before the court concerning the pre-emption claim other than the entry in the land office, a different case would be presented; but the defendant alleges in his answer an abandonment of this land by Flett in 1871, and a forfeiture of all his rights under the pre-emption entry. He produces before us also the record of a contest before the register and receiver of the local land office of the district in which this land is situated, which contest was carried by appeal to the Secretary of the Interior, and by him decided on the 28th day of November, 1891. From the record so offered, it appears that the plaintiff and defendant in this case and John Flett were parties, and appeared and presented the evidence of their respective rights. In that contest, as appears from the record, the evidence concerning Flett's pre emption settlement was fully submitted, and it was shown that in 1870 Flett had offered to prove up upon his claim before the officers of the local land office, and had been informed by them that the land was railroad land and was not subject to his entry; that he made no appeal from that decision, and in consequence thereof abandoned his claim, and in 1874 made homestead entry on other lands. In consequence of the conclusion so reached by the Secretary of the Interior a patent was issued from the Government to the railroad company for the land on December 13, 1892.

62 There are two periods to be regarded in determining whether the lands passed to the railroad company under its

grant—the date of the grant and the date of the definite location of the road. If at either of these dates a claim attached such as is mentioned in the exceptions to the granting act, the land which was subject to such claim was excluded; but if such a claim attached at a time intermediate between those dates, and was extinguished before the latter date, it would have no discernible effect upon the status of the title (Amacker *v.* N. P. R. R. C., 7 C. C. A., 518), and this irrespective of whether or not the claim was in existence at the time of filing the map of general route, so as to exclude the land from the consequent withdrawal in favor of the railroad company. The fact that this land was not among the lands so withdrawn from sale or settlement has no bearing upon the questions involved. The withdrawal was a provision for the protection of the grant, but it was not a step in the acquirement of the railroad company's title. Its title to lands under the grant did not depend upon the withdrawal.

The material fact in this case is, that at the time the line was definitely located the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant, amending his entry and releasing the lands as in the Amacker case, or by the abandonment and forfeiture of the claim as in the case now
63 under consideration. The defendant relies upon the fact that the Flett entry remained uncanceled until 1891. A declaratory pre-emption statement on file prior to and at the time the grant was made would be proof of the intention of Congress to exclude from the grant the land covered thereby; and such an entry in the files of the land office, made after the date of the grant and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant; for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the *bona fides* of such a claim or the performance of the conditions which rested upon the claimant. But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry the life of which is admitted to have expired, but must be guided by the admitted fact.

It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864, and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located, a-d the plaintiff is therefore entitled to judgment.

W. B. GILBERT, *Judge.*

64 (Endorsed:) Filed September 13, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy clerk.

And afterwards, to wit, on the 15th day of September, 1894, there was duly filed in said court, in said cause, a motion for new trial, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Henry C. Payne, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
No. 193.

Motion for New Trial.

Comes now the defendant, James De Lacey, and moves the court to set aside the findings of fact, conclusions of law, and the judgment entered in the above-entitled cause as found and rendered and filed in said cause, Sept. 13, 1894, for the following causes, to wit:

1st. For error of the court in sustaining the motion of plain-
65 tiffs to strike out the 3rd paragraph of defendant's original answer, alleging the attempted settlement and attempted homestead filing of John Alger upon the premises in dispute, and subsequent appeal and pending of said claim and appeal from July 10th, 1883, until November 28, 1891, as being immaterial.

2nd. For error of the trial court in permitting the plaintiffs to introduce as evidence the patent from the United States to plaintiff, Northern Pacific Railroad Company, for the land in dispute, for the reason (Ex. "A," schedule and record) that the same is incompetent, immaterial, and not tending to prove any issue made in the pleadings.

3rd. For error of the trial court in permitting plaintiffs to introduce as evidence Exhibit "B" of plaintiffs' rebutting evidence, being a certified copy of the map of general route of branch line, filed August 20, 1873, for the reason the same is incompetent and immaterial, and not tending to prove any issue made in the pleadings.

4th. For error of the trial court in permitting plaintiffs to introduce as evidence Exhibit "C" of plaintiffs' rebutting evidence, being certified copy of map of amended line of general route, filed June 11, 1879, for the reason the same is immaterial, incompetent, and not tending to prove any issue made in the pleadings.

5th. For error of the trial court in permitting plaintiff- to introduce as evidence Plaintiffs' Exhibit "D," being in rebuttal to defendant's evidence, and set out in plaintiffs' schedule of evidence and record, for each of the items therein, to wit, 1, 2, 3, 4, and 5,

for the reason that the same are immaterial, incompetent, and not tending to prove any issue made in the pleadings.

66 6th. The court erred in permitting plaintiffs, in rebuttal, to introduce the letters and endorsements set out in plaintiffs' schedule, Exhibit- "D" to "F," submitted by plaintiffs and shown by the record, for the reason that the same is immaterial, incompetent, and as not tending to prove any issue made in the pleadings.

7th. The court erred in permitting plaintiffs, in rebuttal, to introduce as evidence any and all the documentary evidence and maps as shown on the schedule of plaintiffs' testimony served and furnished the court, and as shown by the record in said cause, for the reason that all and each of said documents offered and received by the court are immaterial and irrelevant, and not tending to prove any issue made in the pleadings; to the introduction of which defendant at the time objected. Same overruled, and exceptions allowed by the court.

8th. The court erred in finding that the land in controversy was excluded from the grant on the main line of said railroad from Portland to the Puget sound, and holding that the same was embraced in the map as amended by route over the branch line under map filed in 1884; and in holding that by reason of Flett's abandonment of D. S., 1227, the land reverted to the public domain, and that the grant of 1864 attached thereto and said land, covered thereby.

9th. The court erred generally in finding from the pleadings and evidence in favor of the plaintiffs, and against the defendant on the issues made in the pleadings; and erred in rendering judgment in said cause against the defendant and in favor of the plaintiffs.

67 This motion is made and submitted upon the records of the trial, minutes of the court, the evidence offered by plaintiffs and objected to by the defendant, as shown by the schedule filed, and the records kept during the trial, and upon all the evidence in the case, and all rulings and exceptions taken, and upon the pleadings and proceedings on file in the clerk's office, and upon each of them, as well as upon the whole record in the case.

And asks that on rehearing the court sustain this motion and set aside said judgment in favor of plaintiffs, and for such judgment as should under the evidence and law be entered in favor of defendant.

Dated Sept. 15, 1894.

BALLARD & NORRIS,
Attorneys for Defendant.

Received copy of the foregoing motion this 15th day of September, 1894, at Tacoma, W'n.

ASHTON & CHAPMAN,
Attorneys for Plaintiff.

(Endorsed:) Filed September 15, 1894. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy.

And afterwards, to wit, on the 6th day of October, 1894, there was duly filed in said court, in said cause, a findings of fact, in the words and figures as follows, to wit:

68 In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant.

Findings of Fact and Conclusions of Law.

Be it remembered, that this cause coming on regularly for trial on the 18th day of July, 1894, before the court, sitting without a jury (a trial by jury having been waived by a stipulation in writing signed and filed in court by the attorneys of the parties plaintiff and defendant herein before the trial commenced, and evidence having been introduced and the cause having been argued by counsel for both plaintiff and defendant), the same was, by the court, taken under advisement, and now, on this — day of September, A. D. 1894, the court hereby makes and files the following special findings of fact:

Findings of Fact.

That by an act approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph
69 line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," the Congress of the United States authorized and empowered the plaintiff to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be adopted by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch via the valley of the Columbia river to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus. And to aid in the construction of said railroad and telegraph line there was granted to said railroad company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company might adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passed through any State, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroads should be definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

70 II.

By a joint resolution approved May 31, 1870, entitled "A resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its railroad, and to secure the same by mortgage, and for other purposes," the said United States authorized the said plaintiff to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.

III.

March 6, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, transmitted to the Secretary of the Interior a map of the general line of said railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, together with the following letter:

"WASHINGTON, D. C., *March* 6, 1865.

SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their road from a point on Lake Superior, in the State of Wisconsin, to a point on Puget sound, in Washington Territory, via the valley of the Columbia river, adopted by said company as the line of said railroad subject only to
71 such variations as may be found necessary after more specific surveys, and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

I am, respectfully, your obedient servant,

JOSIAH PERHAM,
President Northern Pacific Railroad Company.

Hon. J. P. Usher, Secretary of the Interior.

The line in the Territory (now State) of Washington, as shown on said map, entered the State west of Lake Pend d'Oreill, thence ran in a southwesterly direction to the junction of the Snake and Columbia rivers. At this point there was a branch, and one line ran in a northwesterly direction to the Yakima river and across the mountains to a point on Puget sound, near where the city of Tacoma now is. The other branch extended south and west down the valley of the Columbia river to a point opposite the mouth of the Willamette river, thence in a northerly direction to Puget sound, where it joined the line crossing the Cascade mountains. The land in controversy is on and within forty miles of this line.

IV.

July 30, 1870, a map of the main line of said Northern Pacific railroad, showing the general route thereof, was filed in the office of the Secretary of the Interior, and was transmitted by that
72 officer to, and filed in, the office of the Commissioner of the General Land Office, August 13, 1870. The land in controversy is on and within forty miles of this line of general route.

V.

May 14, 1874, the said railroad company filed with the Secretary of the Interior, and that officer transmitted to the Commissioner of the General Land Office for filing, a map showing the definite location of that portion of the line of said Northern Pacific railroad, extending from Tacoma southerly to Tenino, and on said day the Commissioner of the General Land Office, in accordance with the instructions of the Secretary of the Interior, duly filed the said map. The land in controversy is within the forty-mile limits of the grant to said company as defined by this map.

VI.

The plaintiff duly constructed the main line of its road over the line designated on said map, and opposite the land in controversy, and that portion of said line having been examined by commissioners appointed by the President of the United States for that purpose, was by them reported to be constructed in a good, substantial, and workmanlike manner, as required by the act of Congress, and the President of the United States, upon receipt of said report, to wit, on the — day of ——, —, approved the same and accepted said road.

VII.

August 20, 1873, the plaintiff filed in the office of the Com-
73 missioner of the General Land Office a map showing the general route of its branch line of railroad extending from a point on said main line, in northern Idaho, thence in a general westerly direction across the Cascade mountains to Puget sound. The land in controversy did not fall within forty miles of this line of general route.

VIII.

After the filing of said map of general route in 1873, the said railroad company applied to the Secretary of the Interior for permission to amend said line of general route, and after much correspondence, and it appearing that the interests of both the United States and the railroad company would be materially benefited by such amendment, the line of the branch being thereby greatly shortened and much more practicable and eligible route thereby adopted, the Secretary of the Interior authorized such amendment, and thereafter, to wit, May 10, 1879, the said railroad company

transmitted to the Secretary of the Interior a map showing such relocated line of general route. June 11, 1879, such map was, by the Secretary of the Interior, transmitted to the Commissioner of the General Land Office for filing, with instructions that the same be filed, and that the lands cotermin-us therewith be withdrawn from sale, pre-emption, or entry for the benefit of said railroad company, and on said day said map was duly filed in the office of the Commissioner of the General Land Office. There was filed with said map a relinquishment, made by the said railroad company in consideration of the permission to relocate such line of general route, of all lands on and within forty miles of the line of
74 general route filed in 1873, which were not also within forty miles of the relocated line. The land in controversy is on and within forty miles of the relocated line of general route.

IX.

July 3, 1879, the Commissioner of the General Land Office directed the register and receiver of the United States district land office at Olympia, Washington, within which district the land in controversy is situate, to withhold from sale or entry the public lands within 40 miles of and cotermin-us with such relocated line of general route. This order was received and filed in the office of the register and receiver during the same month.

X.

Thereafter the said railroad company surveyed and definitely located the line of its branch road extending from Tacoma to South Prairie, and March 26, 1884, filed a map showing such line of definite location in the office of the Commissioner of the General Land Office. The land in controversy is within the limits of the grant for the branch line, as defined by this map of definite location.

XI.

The said railroad company duly constructed twenty-five miles of the line of the branch road from the terminus in the city of Tacoma to a point near South Prarie, and the same having been examined by commissioners appointed for that purpose by the President of the United States, was by said commissioners, April 23, 1884, reported to have been constructed in a good, substantial, and
75 workmanlike manner, as required by the said act of Congress, October 1, 1884, this report was transmitted by the Secretary of the Interior to the President of the United States, with the recommendation that this portion of the road be accepted, and October 7, 1884, it was by the President so accepted.

XII.

April 9, 1869, one John Flett filed declaratory statement No. 1227, declaring his intention to purchase the east half of the southwest quarter (E. ½ of S. W. ¼), the southeast quarter of the northwest quarter (S. E. ¼ N. W. ¼), and the southwest quarter of the north-

east quarter (S. W. ¼ of N. E. ¼) of section twenty-one (21), township twenty (20) north, of range three (3) east, under the laws of the United States authorizing the pre-emption of unoffered lands. Whether or not Flett was at this time qualified to enter the land under the pre-emption or homestead laws does not appear.

XIII.

In the fall of 1869 Flett left the land in controversy, and did not thereafter reside thereon, although it is recited in the decision of the Secretary of the Interior in a contest between the railroad company, De Lacey, Flett, *et al.*, before the Interior Department, involving the land here in controversy, that in September, 1870, Flett went to the local land office and told the officers that he had come to prove up on his claim; that they told him it was railroad land, and that he had lost it; that Flett did not then actually offer to
76 make proof, but acquiesced in the advice of the local officers that he was not entitled to submit proof under his filing.

XV.

The defendant, James De Lacey, settled upon the land in controversy in April, 1886. April 5, 1886, he applied to make homestead entry thereon. His application was rejected for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines. From this decision by the register and receiver De Lacey appealed to the Commissioner of the General Land Office.

XVI.

September 7, 1887, John Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869.

XVII.

Afterward, under the instructions of the Commissioner, a hearing was had, at which all the parties, the railroad company, James De Lacey, John Algyr, and John Flett were present. July 27, 1889, the receiver of the district land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated. From this finding all the parties but Flett appealed to the Commissioner of the General Land Office, and December 5, 1889, the Commissioner sustained the finding of the receiver. Thereafter the other parties to the contest appealed to the Secretary of the Interior. September 28, 1891, the Secretary of the Interior re-
77 versed the ruling of the Commissioner of the General Land Office, and awarded the land in controversy to the railroad company.

December 13, 1892, letters patent of the United States, regular in form, were issued, conveying the land in controversy to the plaintiff.

XIX.

Flett's declaratory statement was not formally canceled upon the records until Dec. 23, 1891.

XX.

The defendant is in possession of the land and withholds such possession from the plaintiff.

XXI.

The value of the land in controversy is over $100,000.00.

Conclusions of Law.

First. That the said plaintiff, under and by virtue of said act of Congress approved July 2, 1864, and the joint resolution of May 31, 1870, and by its compliance with the terms thereof, obtained the legal title to the public lands of the United States on and within 40 miles of the line of its road in Washington, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time of the grant and of the definite location of the line of said road opposite thereto.

Second. That the grant to said Northern Pacific Railroad Company coterminous with the line across the Cascade mountains was made by, and takes effect from, the act of July 2, 1864.

78 Third. That the grant coterminous with the main line from Tacoma to Portland, as against all prior claims or rights, was made by, and takes effect from, the date of the joint resolution of May 31, 1870.

Fourth. That at the date of the grant to said Northern Pacific Railroad Company, July 2, 1864, the land in controversy was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights.

Fifth. That prior to June 11, 1879, and from and after the abandonment of the land by John Flett, the said land was public land of the United States, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

Sixth. That the land in controversy was, from and after June 11, 1879, reserved from sale, pre-emption, or entry, except by said railroad company, by virtue of fixing the line of general route of the branch line coterminous therewith.

Seventh. That the Commissioner of the General Land Office, acting under the Secretary of the Interior was authorized to reserve from sale, location, homestead, or pre-emption entry the odd-numbered sections of public land coterminous with the said line of general route as shown by the map filed in 1879.

Eighth. That from and after the receipt of the order of withdrawal at the United States district land office, to wit, July 19, 1879, the land in controversy was reserved from sale or entry for the benefit of said railroad company, by virtue of said order.

79 Ninth. That at the time John Algyr applied to file declaratory statement for the land in controversy said land was reserved for the benefit of the plaintiff, and was not subject to the operation of the pre-emption or homestead laws.

Tenth. That upon the definite location of said branch line, March 26, 1884, and the subsequent construction of the branch line thereover, the said plaintiff acquired the fee-title to the land in controversy, and became and was entitled to the possession thereof.

Eleventh. That the patent issued by the United States to the plaintiff was rightfully issued.

Twelfth. That the defendant wrongfully and unlawfully withholds possession of said land from said plaintiff.

W. B. GILBERT, *Judge.*

(Endorsed:) Filed October 6th, 1894. A. Reeves Ayres, clerk. Sam'l D. Bridges, deputy.

And afterwards, to wit, on the 9th day of October, 1894, there was duly filed in said court, in said cause, a motion for new trial, in the words and figures as follows, to wit:

80 In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, HENRY C. ROUSE, and HENRY C. PAYNE, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,

vs.

JAMES DE LACEY, Defendant.

No. 193.

Motion for New Trial.

Comes now the defendant, James De Lacey, and moves the court to set aside the findings of fact, conclusions of law, and the judgment entered in the above-entitled cause as found and rendered, and filed in said cause October 6th, 1894, for the following causes, to wit:

1st. For error of the court in sustaining the motion of plaintiffs to strike out the 3rd paragraph of defendant's original answer alleging the attempted settlement and attempted homestead filing of John Algyr upon the premises in dispute and subsequent appeal, and pending of said claim and appeal from July 10th, 1883, until November 28, 1891, as being immaterial.

2nd. For error of the trial court in permitting the plaintiffs to introduce in evidence the patent from the United States to
81 the plaintiff, The Northern Pacific Railroad Company, for the land in dispute, for the reason (Ex. "A," schedule and record) that the same is incompetent, immaterial, and as not tending to prove any issue in this cause.

3rd. For error of the trial court in permitting the plaintiffs to introduce as evidence Exhibit "B" of plaintiffs' rebutting evidence,

for the reason that the same is immaterial, the map of general route having been previously fixed and admitted in the pleadings.

4th. For error of the trial court in permitting plaintiffs to introduce as evidence Plaintiffs' Exhibit- "C," "D," "E," and "F," with the items therein contained and numbered as shown by plaintiffs' schedule of evidence, and the record in this case, for the reason that the same, and each of them, are immaterial and incompetent.

6th. The court erred in permitting plaintiffs in rebuttal to introduce the letters and endorsements set out in plaintiffs' schedule Exhibits "D" to "F," inclusive, and as shown by the record, for the reason that the same is incompetent and immaterial.

7th. The court erred in permitting the plaintiffs in rebuttal to introduce all or any part of the documentary evidence, and maps, as shown on the schedule of plaintiffs' testimony, served and furnished the court, as shown by the record in said cause, for the reason that each and all of the said documents offered and received by the court were and are immaterial and irrelevant, and not tending to prove any issue made in the pleadings.

82 8th. The court erred in his findings of fact, numbered from one (1) to seventeen (17), inclusive, said facts so found being in conflict with the facts as found by the Commissioner of the General Land Office upon the evidence submitted in the matter of contest between said pre-emptor Flett, the plaintiffs Northern Pacific Railroad Company, James De Lacey and John Algyr.

9th. The court erred in finding that the land in controversy was excluded from the grant on the main line of said Northern Pacific railroad from Portland to Puget sound, and then holding that the same was embraced in the map as amended by the route over the branch line, filed in 1884. And in holding that by reason of Flett's alleged abandonment of his declaratory statement No. 1227, the land reverted to the public domain, and that the grant of 1864 of the branch line attached thereto, and covered said land in controversy.

10th. The court erred in holding the land excluded from the grant on the main line under the act of Congress of 1870, and then holding said land as covered by the grant of 1864, under the amended map of 1884.

11th. The court erred in holding that by reason of the defendant's allegation to make proof in 1871, the lands reverted to the public domains, and became subject to prior or subsequent grants in the face of the proof from the records that this land had been pre-empted by said Flett as alleged, and that the same was undetermined and uncanceled until November 28, 1890, when for the first time under the rules of the Land Department said land reverted to the public domain.

83 12th. The court erred in finding that the land in controversy was covered by and passed to the plaintiffs under the grant of 1864, when the proof shows that said lands were within the grant of July 1st, 1870, on the main line of said road from Portland, Oregon, to Tacoma, Wash., on Puget sound, and covered by the order of withdrawal of August 13, 1870, and which facts are shown

by the patent as offered in evidence by the plaintiffs, and the alleged facts in defendant's amended answer, and sustained by the proof, shows that Flett's pre-emption D. S., No. 1227, was prior to said act, and excluded said land from the grant.

13th. The court erred generally in finding from the pleadings and evidence in favor of the plaintiffs and against the defendant on the issues made in the pleadings and defendant's evidence offered in support thereof; and erred in rendering judgment in said cause against the defendant and in favor of said plaintiffs.

This motion is made and submitted upon the records of the trial, minutes of the court, the evidence offered by plaintiffs and objected to by the defendant, as shown by the schedule filed, and the records kept during the trial, and upon all the evidence in the case, and all rulings and exceptions taken, and upon the pleadings and proceedings on file in the clerk's office of said court in said cause, and upon each of them, as well as upon the whole record of the said cause.

And asks that on rehearing, the court sustains this motion,
84 and set aside said judgment in favor of plaintiff, and for such judgment as should under the evidence and law be entered in favor of the defendant.

Dated October 9th, 1894, at Tacoma, W'n.

BALLARD & NORRIS,
Attorneys for Defendant.

Received copy of the foregoing motion this 9th day of Oct., A. D. 1894, at Tacoma, W'n.

F. M. DUDLEY, AND
ASHTON & CHAPMAN,
Attorneys for Plaintiffs.

Filed October 9, 1894.

A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

And afterwards, to wit, on Wednesday, the 28th day of November, 1894, the same being the 32nd judicial day of the regular July term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, and the Honorable William B. Gilbert, United States circuit judge, presiding—the following proceedings were had in said cause, to wit:

Order Denying Motion for New Trial.

Now, on this day this cause coming on for hearing on motion of defendant for a new trial, and the court, after hearing the argument of counsel and being fully advised in the premises,
85 Orders that said motion be, and the same hereby is, denied, to which ruling of the court defendant excepts, and his exception is allowed.

And afterwards, to wit, on Wednesday, the 26th day of December, 1894, the same being the 35th judicial day of regular July term of said court—present, the Honorable William B. Gilbert, United

States circuit judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Judgment.

And now, to wit, on this 28th day of November, 1894, the defendant's motion for a new trial herein came on to be heard in open court, the plaintiff being present by its attorneys, Messrs. Ashton and Chapman, and the defendant by his attorneys, Messrs. Ballard & Norris.

86 And the court after having heard argument upon said motion for a new trial herein, and being duly advised in the premises, overrules the same, to which ruling of the court the defendant excepts and his exception is allowed, and the defendant gives notice in open court of an appeal of this case to the United States circuit court of appeals for the ninth judicial circuit.

It is, therefore, ordered and adjudged by the court that the plaintiff, Northern Pacific Railroad Company, do have and recover of and from the defendant James De Lacey the possession of the real property described in the complaint, to wit, the southwest quarter of the northeast quarter (S. W. 4 of N. E. 4), the southeast quarter of the northwest quarter (S. E. 4 of the N. W. 4), and the east half of the southwest quarter (E. 2 of the S. W. 4), of section twenty-one (21) township twenty (20), north, range three (3) east of Willamette meridian, in Pierce county, Washington, and that said plaintiff have and recover from said defendant the costs of this action, amounting to $214.00.

It is further ordered and adjudged that a writ of restitution issue herein, restoring to plaintiff the possession of the above-described real property and premises within ten days from this date.

Dated Dec. 26th, 1894.

WM. B. GILBERT, *Judge.*

Due service of within by receipt of a true copy thereof admitted this 24th day of Dec., 1894.

BALLARD & NORRIS,
Attorneys for Def't.

Filed Dec. 26th, 1894.

A. REEVES AYRES, *Clerk.*

87 And afterwards, to wit, on the 18th day of May, 1895, there was duly filed in said court, in this cause, a notice of appeal, in the words and figures as follows, to wit:

In the United States Circuit Court, Ninth Circuit, Western Division of Washington.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, Receivers of said Northern Pacific Railroad Company, Plaintiff-,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Notice of Appeal.

To the above-named plaintiff- in the above-entitled cause, No. 193, and Messrs. Ashton & Chapman and F. M. Dudley, attorneys for said plaintiff-:

You and each of you will take notice that the defendant in said above cause, James De Lacey, hereby appeals from the final judgment made and entered in the above cause, No. 193, on the 26th day of December, A. D. 1894, to the next United States circuit court of appeals for the ninth circuit, holding terms of said ninth circuit court of appeals of the United States at San Francisco, State of California.

88 Of which appeal you will take due notice.

Dated Tacoma, Washington, May 17th, 1895.

BALLARD & NORRIS,
Attorneys for Defendant, and
THOMAS CARROLL,
Of Counsel for Defendant.

Filed in the U. S. circuit court May 18, 1895.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on Tuesday, the 25th day of February, 1896, the same being the 15th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

Order for Entry of Mandate.

Now, on this day, in open court, it is ordered that the mandate from the circuit court of appeals for this circuit be filed and entered herein, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the dis-
[SEAL.] trict of Washington, western division, Greeting:

Whereas, lately in the circuit court of the United States for the district of Washington, western division, before you or some
89 of you, in a cause between The Northern Pacific Railroad Company, plaintiff, and James De Lacey, defendant, a judg-

ment was duly filed and entered in favor of said plaintiff, which said judgment is in words and figures following, to wit:

And now, to wit, on this 28th day of November, 1894, the defendant's motion for a new trial herein came on to be heard in open court, the plaintiff being present by its attorneys, Messrs. Ashton & Chapman, and the defendant by his attorneys, Messrs. Ballard & Norris.

And the court after having heard argument upon said motion for a new trial herein, and being duly advised in the premises, overrules the same, to which ruling of the court the defendant excepts and his exception is allowed, and the defendant gives notice in open court of an appeal of this case to the United States circuit court of appeals, for the ninth judicial circuit.

It is therefore ordered and adjudged by the court that the plaintiff, Northern Pacific Railroad Company, do have and recover of and from the defendant, James De Lacey, the possession of the real property described in the complaint, to wit, the sout-west quarter of the northeast quarter (S. W. 4 of N. E. 4), the southeast quarter of the northwest quarter (S. E. 4 of the N. W. 4), and the east half of the southwest quarter (E. 2 of the S. W. 4), of section twenty-one (21), township twenty (20) north, range three (3) east, of Willamette meridian, in Pierce county, Washington, and that said plaintiff have and recover from said defendant the costs of this action, amounting to $214.00.

It is further ordered and adjudged that a writ of restitution
90 issue herein restoring to plaintiff the possession of the above-described real property and premises within ten days from this date.

Dated Dec. 26th, 1894.

And whereas, by order of court filed in said circuit court on February 6, 1894, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of said Northern Pacific Railroad Company, were made parties defendant therein; and whereas the writ of error herein included said receivers, and the citation issued returnable to our said circuit court of appeals, was directed to them, as by the inspection of the transcript of the record of the said circuit court, which was brought into the United States circuit court of appeals, for the ninth circuit, by virtue of a writ of error agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in a term of October, and in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby, *reserved* and the cause is remanded for further proceedings not inconsistent with the views expressed in the opinion of this court.

(FEB. 3, 1896.)

You, therefore, are hereby commanded that such reversal and further proceedings be had in said cause, not inconsistent
91 with the opinion and judgment of this court, and as according to right and justice and the laws of the United States ought to be had, the said judgment of said circuit court notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of February, in the year of our Lord one thousand eight hundred and ninety-six.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Costs of plaintiff in error, —.
Filed February 25th, 1896.

A. REEVES AYRES, *Clerk.*

92 U. S. Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC R. R. Co.
vs.
JAMES DE LACEY. } No. 244.

Costs of Plaintiff in Error.

Paid clerk U. S. circuit court for transcript	$117.50
Paid U. S. marshal serving writ of error	8.24
Paid docketing cause and filing record	5.00
Paid entering 2 appearances	50
Paid entering one order	20
Paid filing 2 papers	50
Paid filing briefs	10.00
Paid drawing, filing, and recording judgment	1.65
Paid mandate $5, costs and copy .40	5.40
Paid printing record	236.90
Paid expressage on record 40c., att'y's docket fee $20	20.40
Taxed at	$406.59

F. D. MONCKTON, *Clerk.*

And afterwards, to wit, on 2nd day of April, 1896, there was duly filed in said court, in this cause, a motion for judgment, in the words and figures as follows, to wit:

93 In the Circuit Court of the United States in and for the Ninth Circuit, Western Division of Washington.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pac. R. Co., Plaintiffs,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Motion for Judgment.

Now comes the defendant, James De Lacey, and shows to the honorable court that the above cause was commenced in this court, tried and judgment entered against defendant.

That the defendant appealed said cause to the circuit court of appeals of the 9th circuit, where the judgment of the trial court was reversed, and said court of appeals in its opinion filed, says: "Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion."

That on the 21st day of February, 1896, mandate issued, and by order of this court, on motion, said mandate was filed and entered of record in said cause March 11th, 1896.

Defendant now moves the court for final judgment upon
94 the facts found by the honorable trial judge, and the law as laid down in said opinion of the honorable circuit court of appeals, and for such other or further proceedings as may be necessary, that justice may be done the parties.

BALLARD & NORRIS,
Attorneys for Defendant, James De Lacey.

Filed in the U. S. circuit court, April 2, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 28th day of May, 1896, there was duly filed in said court, in this cause, a notice of motion for judgment, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pac. R. Co., Plaintiffs,
vs.
JAMES DE LACEY, Defendant. } No. 193.

Notice of Motion for Judgment.

To the above-named plaintiffs and Messrs. Ashton & Chapman and F. M. Dudley, attorneys for said plaintiffs:

95 Notice is hereby given you that the mandate from the U. S. circuit court of appeals of the ninth circuit, holding terms

at San Francisco, California, was filed and entered in the above circuit court, at Tacoma, W'n.

And on April 2nd, 1896, the counsel for the defendant filed in said cause a formal motion for judgment; a copy of said motion marked Exhibit "A," and made part of this notice, is herewith served upon you.

And you are further notified that said motion will be called up, and asking for final judgment in said cause, on Monday the 4th day of May, 1896, according to said mandate, at which time said motion will be heard, or as soon thereafter as counsel can be heard by the court.

BALLARD & NORRIS,
Attorneys for Defendant.

Filed in the U. S. circuit court, May 28, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dept.*

And afterwards, to wit, on Thursday, the 28th day of May, 1896, the same being the 26th judicial day of the regular February term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

96 In the Circuit Court of the United States for the District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, and Thomas F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} No. 193.

Judgment.

Be it remembered that on this 28th day of May, A. D. 1896, the same being one of the regular court days of said above court, Honorable Judge C. H. Hanford, sole judge and presiding:

This cause coming on for hearing on notice duly served, and defendant's motion for judgment in compliance with the findings and judgment of the United States circuit — of appeals in and for said ninth circuit, holding terms at the city of San Francisco, California, as shown by the opinion rendered in said cause on appeal, and the mandate of said court of appeals filed herein and entered on the 11th day of March, A. D. 1896, by order of this court.

97 And after due consideration thereof by the court, the facts in issue having all been found on the trial of said cause, and not controverted in said appeal, and in conformity with the law of the case set out in the opinion of said court of appeals—

It is now ordered and adjudged by this court, that the patent issued by the United States Government to the plaintiff company,

on which plaintiff's cause of action and title rests, issued December 13th, A. D. 1892. for the land in controversy, to wit, the southwest quarter (S. W. ¼) of the northeast quarter (N. E. ¼), the southeast quarter of the northwest quarter (S. E. of N. W.), and the east half (E. ½) of the southwest quarter (S. W. ¼), section twenty-one (21), township twenty (20), north of range three (3) east of the Willamette meridian, in Pierce county, State of Washington, was issued without authority of law, and is therefore, void.

It is now, therefore, ordered and adjudged, by the court, that the above plaintiffs have no cause of action, and this cause is dismissed at the cost of plaintiffs.

And it is further ordered and adjudged by the court that the defendant herein have and recover of and from the plaintiffs herein his costs and legal disbursements in the sum of $—.

By order of the court.

C. H. HANFORD, *Judge.*

(Endorsement:) Filed in the U. S. circuit court, May 28, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

98 And afterwards, to wit, on Wednesday, the 17th day of June, 1896, the Honorable Cornelius H. Hanford, United States district judge, at chambers, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} No. 193.

Order Extending Time within Which to File Bill of Exceptions.

And now, to wit, on this 17th day of June, 1896, and within the time allowed plaintiffs for filing their bill of exceptions herein, upon plaintiffs' motion that they be given an extension of fifteen (15) days from this date within which to prepare and file their bill of exceptions, it is ordered and directed that plaintiffs be, and the same are hereby allowed fifteen (15) days additional time from
99 this date within which to prepare and file their bill of exceptions herein.

Done at chambers, this 17th day of June, 1896.

C. H. HANFORD, *Judge.*

Filed in the U. S. circuit court, June 17, 1896.

A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 2nd day of July, 1896, there was duly filed in said court, in this cause, a bill of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Bill of Exceptions.

Be it remembered, that on the 28th day of May, in the year of our Lord 1896, at a stated term of the said court begun and
100 holden in Tacoma, in and for the district of Washington, western division, before his honor, C. H. Hanford, district judge, the above case came on for hearing upon the motion of said defendant for judgment, which said motion is in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. Oakes, Henry C. Rouse, and Thomas C. Payne, Receivers of said Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
No. 193.

Now comes the defendant James De Lacey, and shows to the honorable court that the above cause was commenced in this court, tried, and judgment entered against defendant. That the defendant appealed said cause to the circuit court of appeals of the 9th circuit, where the judgment of the trial court was reversed, and said court of appeals in its opinion filed, says: 'Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.'
101 That on the 21st day of February, 1896, mandate issued, and by order of this court, on motion, said mandate was filed and entered of record in said cause March 11th, 1896.

Defendant now moves the court for final judgment upon the facts found by the honorable trial judge, and the law as laid down in said opinion of the honorable circuit court of appeals, and for such other and further proceedings as may be necessary, that justice be done to the parties.

BALLARD & NORRIS,
Attorneys for Defendant, James De Lacey."

That said motion having been called up for hearing by the counsel for said defendant, the said plaintiffs thereupon, by their counsel, protested and objected to the allowance of said motion for the reasons following:

First. That said plaintiffs were, under the mandate of said United States circuit court of appeals, entitled to a new trial in said action for the purpose of showing the facts necessary to establish that the said Northern Pacific Railroad Company had good title in fee in and to the land described in the complaint.

Second. That the judgment, which was presented to the court for signature, together with said motion, was in part a decree in equity, in that it decreed that the patent issued to said Northern Pacific Railroad Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void.

That thereupon said court overruled said objections and granted said motion, to which action of said court the plaintiffs did
102 then and there except; and their said exception was then and there allowed and entered, and plaintiffs were allowed twenty days within which to file their bill of exceptions.

Forasmuch as the facts aforesaid, and the decision of the court thereon, do not appear of record, the plaintiffs pray that this, their bill of exceptions may be allowed.

Now, therefore, I, C. H. Hanford, judge of said court and trial judge in the above-entitled cause, do hereby certify that the foregoing bill of exceptions, from page 1 to page 4, inclusive, contains the rulings of the court upon said motion and defendant's exceptions thereto, which were allowed by the court.

And forasmuch as the said facts and matters and the rulings of the court thereon do not appear of record, and the defendant prays that his bill of exceptions may be allowed, the same is accordingly allowed and sealed.

Done at Seattle, Washington, this 2nd day of July, A. D. 1896.

C. H. HANFORD, *Judge.*

Received copy of the within bill of exceptions this 16th day June, 1896.

BALLARD & NORRIS,
Attorneys for Def'd't.

(Endorsement:) Filed in the U. S. circuit court July 2, 1896. A. Reeves Ayres, clerk. Sam'l D. Bridges, dep.

103 And afterwards, to wit, on the 9th day of September, 1896, there was duly filed in said court, in this cause, an assignment of errors in the words and figures as follows, to wit:

United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Assignment of Errors.

Comes now the above-named plaintiffs, by their attorney, and say that in the records and proceedings in the above-entitled action in the said United States circuit court for the district of Washington, western division, there is manifest error as follows, to wit:

I.

The said court overruled plaintiff's demurrer to the affirmative defense in the defendant's answer herein.

104 II.

The said court refused to order a new trial, and entered judgment without the intervention of a jury, upon the defendant's motion.

III.

That the said judgment grants to the defendant equitable relief in that it decrees that the patent issued to the said Northern Pacific Railroad Company for the land described in the complaint herein, which said patent is dated December 13, 1892, is null and void.

IV.

The court failed and refused to hold that the patent of the United States issued to the plaintiffs December 13, 1892, conveyed to said plaintiffs the legal title to the land in controversy, and that plaintiffs are entitled to recover in this action.

V.

That said court entered a judgment not sustained by the findings of fact.

VI.

The said court failed and declined to hold that said Northern Pacific Railroad Company is the owner of, and that plaintiffs are entitled to the possession of, the land in controversy.

105 Wherefore, said plaintiffs pray that the said judgment of the said United States circuit court for the district of Washington, western division, be reversed.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiffs.

Filed in the U. S. circuit court Sept. 9, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on the 9th day of September, 1896, there was duly filed in said court, in this cause, a petition for writ of error, in the words and figures as follows, to wit:

106 United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.

Petition for Writ of Error.

To the honorable judges of the United States circuit court of appeals for the ninth circuit:

Comes now the above-named plaintiffs, by their attorneys, and complain that in the record and proceedings, and also in the rendition of judgment in the above-entitled cause in said United States circuit court for the district of Washington, western division, at the February term thereof, A. D. 1896, against the said plaintiffs on the 28th day of May, A. D. 1896, manifest error hath intervened to the great damage of said plaintiffs.

Wherefore, the said plaintiffs pray for the allowance of a writ of error, and such other process as may cause the same to be
107 corrected by the said United States circuit court of appeals for the ninth circuit.

ASHTON & CHAPMAN,
F. M. DUDLEY,
Attorneys for Plaintiffs.

Allowed: WM. B. GILBERT, *Judge.*

Filed in the U. S. circuit court Sep. 9, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

And afterwards, to wit, on Wednesday, the 21st day of October, 1896, the same being the 28th judicial day of the regular July term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, T. F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers Thereof, Plaintiffs,
vs.
JAMES DE LACEY, Defendant.
} Case No. 193.

Order of Substitution.

108 On this 21st day of October, A. D. 1896, came on for hearing at chambers the application of plaintiff in above action for an order substituting as plaintiff The Northern Pacific Railway Company. It appearing to the court that the Northern Pacific Railway Company has acquired by purchase the rights of plaintiffs in and to the property described in the complaint, and it further appearing that all rights of said plaintiffs have been transferred to said company, and that said company is the necessary and proper party plaintiff:

It is, therefore, ordered that said Northern Pacific Railway Company be, and it is hereby, substituted as plaintiff in the above action. It is further ordered upon application of said plaintiff that a bond on appeal may be given in said cause by The Northern Pacific Railway Company, the substituted plaintiff in said action, with the same force and effect as though given by the original plaintiffs, and that all proceedings hereafter be in the name of said Northern Pacific Railway Company, as plaintiff. It is further ordered that the amount of bond on appeal, being for cost, be, and the same is hereby, fixed at the sum of one thousand dollars, and that the same be given in the usual form.

C. H. HANFORD, *Judge.*

Filed in the U. S. circuit court Oct. 21, 1896.
A. REEVES AYRES, *Clerk.*
SAM'L D. BRIDGES, *Dep.*

STATE OF WASHINGTON, } ss:
County of Pierce, }

W. L. Sahse, being duly sworn upon oath, deposes and says
109 that he is a citizen of the United States of America, and is over the age of twenty-one years, and is competent to be a witness in all the courts of justice; that on the 21st day of October, 1896, he served the within order upon Achilles W. Ballard, at his office in the California block, Tacoma, Washington, one of the attorneys for defendant herein, by then and there delivering to and leaving with said Ballard a true copy of the within order, and further saith not.

W. L. SASHE.

Subscribed and sworn to before me by the said W. L. Sahse this 21st day of October, 1896.

A. G. AVERY,
Notary Public, Residing at Tacoma, Washington.

And afterwards, to wit, on the 26th day of October, 1896, there was duly filed in said court, in this cause, a bond on writ of error, in the words and figures as follows, to wit:

110 United States Circuit Court for the District of Washington, Western Division.

NORTHERN PACIFIC RAILROAD COMPANY, T. F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company, Plaintiffs, vs. JAMES DE LACEY, Defendant. } No. 193.

Bond on Writ of Error.

Know all men by these presents, that the City Trust, Safe Deposit and Surety Company, of Philadelphia, Pennsylvania, a corporation organized and existing under the laws of said State of Pennsylvania, is held and firmly bound unto James De Lacey, of Tacoma, Washington, the defendant in the above-entitled action, in the penal sum of one thousand ($1,000) dollars, for the payment of which well and truly to be made unto the said James De Lacey, the said City Trust, Safe Deposit and Surety Company hereby binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal and dated this 23rd day of October, 1896.

The conditions of the above obligation are such that whereas, heretofore, to wit, on the 28th day of May, 1896, on motion
111 of attorneys for defendant, judgment was entered by the above-entitled court dismissing said above-entitled action; and

Whereas, subsequent to the entry of said judgment of dismissal steps were taken in said action by the plaintiffs therein for the purpose of appealing from said judgment dismissing said action to the United States circuit court of appeals for the ninth circuit, holding terms at the city of San Francisco; and

Whereas, subsequently, by an order made by the above-entitled court on the 16th day of September, 1896, and filed in said case on the 21st day of October, 1896, The Northern Pacific Railway Company was substituted as plaintiff in the above-entitled action in lieu and stead of said Northern Pacific Railroad Company, T. F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, and said order also fixed the amount of the appeal bond in said case at the sum of one thousand (1,000) dollars.

Now, therefore, if the said City Trust, Safe Deposit and Trust Company shall pay, or cause to be paid, all costs that may be

awarded by said United States circuit court of appeals against the Northern Pacific Railway Company, or against any of the plaintiffs in the above-entitled action by reason of said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

In witness whereof the said City Trust, Safe Deposit and Surety Company has hereunto set its hand and affixed its corporate
112 seal, attested by its secretary, this 23 day of October, A. D. 1896.

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY,
By L. R. MANNING, *Its Vice-President.*

Executed in the presence of—
A. P. PRICHARD.
J. L. PENTECOST.

[CORPORATE SEAL.]

Attest: W. PRICHARD,
Its Assistant Secretary.

The foregoing bond is hereby approved this 24th day of October, 1896.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed in the U. S. circuit court October 26, 1896. A. Reeves Ayres, clerk; Sam'l D. Bridges, dep.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, in the ninth circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages contain a true and complete transcript of the record and proceedings in said court in the cause of The Northern Pacific Railroad Company *et al.*, plaintiffs in error, *vs.* James De Lacey, defendant in error, as the same are made of record and in file in my office at Tacoma.

113 In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of Tacoma, in the district of Washington, in the ninth circuit, this sixth day of November, in the year of our Lord one thousand eight hundred and ninety-six, and the Independence of the United States the one hundred and twenty-first.

[SEAL.]

A. REEVES AYRES, *Clerk,*
By SAM'L D. BRIDGES, *Deputy.*

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I, A. Reeves Ayres, clerk of the circuit court of the United States, for the district of Washington, do hereby certify that the cost of the foregoing record amounts to the sum of $36.00, and that the same has been paid in full by the plaintiff in error.

In testimony whereof, I hereunto set my hand and the seal of said court this 6th day of November, A. D. 1896.

[SEAL.] A. REEVES AYRES, *Clerk*,
By SAM'L D. BRIDGES, *Deputy*.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges
114 of the circuit court of the United States for the district of Washington, western division, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said circuit court, before you, or some of you, between The Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse as receivers of said company and The Northern Pacific Railway Company, substituted as party plaintiff in lieu and stead of said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, by the order of said circuit court entered herein on the 16th day of October, 1896, plaintiff-, and James De Lacey, defendant, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers thereof, and the said Northern Pacific Railway Company, substituted as party plaintiff as aforesaid, as is said and appears by the complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the justices of the United States circuit court of appeals for the ninth circuit, at the court-rooms of said court in the
city of San Francisco, California, together with this writ, so
115 that you have the same at the said place, before the justices aforesaid, on the 20th day of November next, that the record and proceedings aforesaid being inspected, the said justices of the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of October, in the year of our Lord one thousand eight hundred and ninety-six, and

of the Independence of the United States the one hundred and twenty-first.

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

The foregoing writ is hereby allowed.

C. H. HANFORD,
Presiding Judge.

UNITED STATES OF AMERICA, } ss:
District of Washington, }

I do hereby certify that I received the within writ on the 26th day of October, 1896, and after due and diligent search was unable to find and serve James De Lacey, defendant in error in the
116 within-entitled action. And I further return that I personally served the within writ on A. W. Ballard, of the firm of Ballard & Norris, attorneys of record of the said James De Lacey, at Tacoma, on the 26th day of October, 1896, by delivering to and leaving with the said Ballard a copy of the within writ duly certified to be such by A. Reeves Ayres, clerk of the United States circuit court.

JAMES C. DRAKE,
United States Marshal for the District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

Marshal's fees, $4.00.

(Endorsed:) Filed in the U. S. circuit court. Oct. 29, 1896. A. Reeves Ayres, clerk, by Sam'l D. Bridges, deputy.

Citation.

UNITED STATES OF AMERICA, ss:

To James De Lacey, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, California, on the 20th day of November, 1896, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, western division, wherein The Northern Pacific Rail-
road Company, Thomas F. Oakes, Henry C. Payne, and
117 Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, The Northern Pacific Railway Company, substituted as party plaintiff in lieu and stead of said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, by the order of said circuit court entered on the 16th day of October, 1896, *is* plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ

of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

C. H. HANFORD, *Judge.*

Dated October 21st, 1896.

Attest:

[SEAL.] A. REEVES AYRES,
Clerk United States Circuit Court, District of Washington,
By SAM'L D. BRIDGES, *Deputy.*

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

I do hereby certify that I received the within writ on the 26th day of October, 1896, and after due and diligent search was unable to find and serve James De Lacey, defendant in error in the within-entitled action. And I further return that I personally served the within writ on A. W. Ballard, of the firm of Ballard & Norris, attorneys of record of the said James De Lacey, at Tacoma, on the 26th day of October, 1896, by delivering to and leaving with
118 the said Ballard a copy of the within writ, duly certified to be such by A. Reeves Ayres, clerk of the United States circuit court.

JAMES C. DRAKE,
United States Marshal for the District of Washington,
By C. D. BRIDGES, *Deputy.*

Marshal' fees, $4.24.

(Endorsed:) Filed in the U. S. circuit court. Oct. 29, 1896. A. Reeves Ayres, clerk, by Sam'l D. Bridges, clerk.

(Endorsed:) No. 339. In the United States circuit court of appeals for the ninth judicial circuit. Northern Pacific Railway Co. (substituted for N. P. R. R. Co. *et al.*), plaintiff in error, *v.* James De Lacey, defendant in error. Transcript. In error to the United States circuit court for the district of Washington, western division. Filed Nov. 13, 1896. F. D. Monckton, clerk.

119 In the United States Circuit Court of Appeals for the Ninth Circuit, Holding Terms at San Francisco, California.

THE NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company; The Northern Pacific Railway Company, Substituted as Plaintiff,

vs.

JAMES DE LACEY, Defendant.

On appeal from the judgment of the honorable United States circuit court, ninth circuit, western division of Washington, holding terms at Tacoma, to the honorable United States circuit court of appeals for the ninth circuit, holding terms at San Francisco, California.

Now comes the appellee, James De Lacey, and moves this honorable court for an order dismissing said appeal and for a judgment herein for the following reasons, among others:

1st. There is no law or precedent for a second appeal from the trial court to this honorable court when, as in this case, on appeal from final judgment to this court, on trial, opinion rendered, filed, and entered, directing entry of judgment in the honorable court below in accordance with the opinion, to which judgment and opinion no exceptions were taken, no review asked, no steps taken to appeal therefrom, or otherwise review said cause and judgment, and the mandate issued to and filed in the honorable circuit — of the United States of the 9th circuit, western division of Washington, the trial court, and judgment entered therein in compliance with the said mandate.

120 2nd. This appeal is dilatory, vexatious, and causes the appellee unnecessary costs and expenses in appearing and attending this honorable court at great loss of time and expense, to his damage in the sum of three hundred and fifty (350) dollars, *which* costs, attorneys' fees, and expense made necessary on account of this unauthorized, dilatory, and vexatious appeal, and for which sum of $350.00, costs, expense, attorneys' fees, and damages appellee asks an allowance and judgment.

3rd. That the above cause was tried on its merits, facts found, and judgment entered in the said honorable circuit court of the United States, 9th circuit, western division of Washington, at Tacoma, on the 13th day of September, 1894, and final judgment entered therein; from which judgment the defendant (this appellee) appealed to the honorable United States circuit court of appeals, where same was tried in San Francisco, California, and judgment and opinion there entered on the 3rd day of February, 1896, reversing the lower court and directing judgment in the court below entered in accordance with said opinion; and to said judgment no exceptions were entered or made, no motion made for revew, no proceedings taken to appeal, review, or modify or overrule same. The mandate issued directing judgment, and mandate filed in the honorable circuit court of the United States, 9th circuit, western division of Washington, and on the 28th day of May, 1896, said honorable court entered final judgment in said cause in compliance with said mandate and opinion of this honorable court of appeals; from which judgment this second appeal is taken. And for these reasons aforesaid appellee moves for dismissal and judgment herein.

121 This motion is based upon the records of said cause now in this court, and which records are made part of this motion.

JAMES DE LACEY, *Appellee*,
By BALLARD & NORRIS,
His Attorneys.

Offices: Rooms 424 & 425 California block, Tacoma, Washington.

Received copy of the above motion this 6th day of November, 1896.

F. M. DUDLEY,
Att'y for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Pierce, }

H. F. Norris, being first duly sworn, on his oath states that he is and was at all times herein mentioned over the age of 21 years; that he received the within and foregoing instrument or motion for service on the 6th day of November, A. D. 1896, and on the 6th day of November, 1896, he duly served the same upon the plaintiff substituted, to wit, upon the said Northern Pacific Railway Company, appellant, by delivering a true copy thereof to W. O. Chapman, one of the attorneys of record of said plaintiff, and a member of the firm of Ashton & Chapman, attorneys of record in said cause for the plaintiff and appellant, at his office in Tacoma, Pierce Co., Washington, personally.

That affiant duly served said instrument upon said appel-
122 lant by leaving with and delivering to Wm. L. Sahse, principal law clerk in charge of the law office of Crowley & Grosscup, attorneys for said appellant, in the headquarters building of said appellant in the city of Tacoma, Pierce county, Washington, said Crowley & Grosscup being then and there the resident attorneys for said Northern Pacific Railway Company, personally, a true copy of said motion; and said Wm. L. Sahse, as such law clerk in charge of said office, duly receipted therefor by signing the name of "F. M. Dudley, attorney for plaintiff," in my presence, on the said 6th day of November, 1896, in Tacoma, Pierce county, Washington.

H. F. NORRIS.

Subscribed and sworn to before me this November 7th, 1896.

[SEAL.] E. STEINBACH,
Notary Public in and for the State of Washington, Residing at Tacoma, W'n.

(Endorsed:) No. 339. U. S. circuit court of appeals, 9th circuit. N. P. R. R. Co. *et al. v.* James De Lacey. Motion to dismiss cause. Filed Nov. 13, 1896. F. D. Monckton, clerk.

123 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for Northern Pacific Railroad Company *et al.*), Plaintiff in Error,
v.
JAMES DE LACEY, Defendant in Error. } No. 339.

In error to the circuit court of the United States for the district of Washington, western division.

This cause having been called for hearing in its regular order and a motion to dismiss having been filed, argued, and submitted

to the court for consideration and decision, and the same having been duly considered—

It is now here ordered and adjudged by this court that the said motion be, and the same is hereby, denied, and that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

(Endorsed:) U. S. circuit court of appeals for the ninth circuit. Northern Pacific R'y Co., pl'ff in error, *v.* Jas. De Lacey. Judgment. Filed Feb. 8th, 1897. F. D. Monckton, clerk.

124 United States Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company), Plaintiff in Error,

vs.

JAMES DE LACEY, Defendant in Error.

Now comes the above-named plaintiff in error and prays this court for a writ of error in the above-entitled action to the United States circuit court of appeals for the ninth circuit to review the judgment entered in said court on the 8th day of February, 1897, in favor of said defendant in error and against said plaintiff in error and affirming the judgment of the United States circuit court for the district of Washington, western division, entered on the 28th day of May, 1896, for the reason that manifest error hath intervened in the rendition of such judgment of said United States circuit court of appeals for the ninth circuit, to the great damage of said plaintiff in error.

Dated June 12th, A. D. 1897.

C. W. BUNN &
F. M. DUDLEY,
Attorneys for Plaintiff in Error.

(Endorsed:) In United States Supreme Court. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Petition for writ of error. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

125 In the United States Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of said Northern Pacific Railroad Company), Plaintiff in Error,

vs.

JAMES DE LACEY, Defendant in Error.

Assignment of Errors.

Now comes the above-named Northern Pacific Railway, plaintiff in error, substituted for The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as

receivers of said Northern Pacific Railroad Company, by C. W. Bunn and F. *D.* Dudley, its attorneys, and says that in the records and proceedings in the above-entitled action in the United States circuit court of appeals for the ninth judicial circuit there is manifest error in this, to wit:

I.

The plaintiff in error assigns as error the several errors set out in the assignment of errors forming part of the record in the above-entitled action before the said circuit court of appeals, to wit:

II.

That the court erred in overruling the demurrer of the plaintiff, the plaintiff in error herein, to the affirmative defense set forth in the answer of the defendant, the defendant in error herein.

III.

That the court erred in refusing to order a new trial and in entering judgment without the intervention of a jury upon the motion of the defendant, the defendant in error herein.

126 IV.

That the court erred in rendering judgment granting to the defendant, defendant in error herein, equitable relief, in that it was decreed and adjudged that the patent issued to the said Northern Pacific Railroad Company for the land described in the complaint herein, which patent is dated December 13, 1892, is null and void.

V.

That the court erred in failing and refusing to hold that the patent of the United States issued to the said Northern Pacific Railroad Company December 13, 1892, conveyed to the said Northern Pacific Railroad Company the legal title to the land in controversy, and that the plaintiff, the plaintiff in error herein, is entitled to recover in this action.

VI.

That the court erred in entering judgment not sustained by the findings of fact.

VII.

That the court erred in failing and declining to hold that the plaintiff, the plaintiff in error herein, is the owner of and entitled to the possession of the land in controversy.

VIII.

Plaintiff in error assigns as further errors that the said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of Washington, western division, erred

in making its order on the 8th day of February, 1897, affirming the judgment of the said circuit court of the United States for the district of Washington, western division.

127 IX.

That the said circuit court of appeals erred in not sustaining the writ of error before it in this action and in not reversing the judgment of the said circuit court rendered in this action, and in not directing a new trial on the issues raised by the pleadings in this action.

X.

And the said Northern Pacific Railway Company, the plaintiff in error herein, prays that the judgment aforesaid, entered by the United States circuit court for the district of Washington, western division, on the 28th day of May, 1896, and the judgment entered herein by the said United States circuit court of appeals on the 8th day of February, 1897, affirming the said judgment of said United States circuit court of May 28th, 1896, for the errors aforesaid and for other error in the record and proceedings in this action, be reversed and annulled and altogether held for naught, and that the mandate of this court may issue directing a new trial of the issues raised by the pleadings herein.

C. W. BUNN &
F. M. DUDLEY,
Attorneys for Northern Pacific Railway Company,
Plaintiff in Error.

Dated June 12th, 1897.

(Endorsed:) In United States Supreme Court. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Assignment of errors. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

128 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad Company), Plaintiff in Error,
vs.
JAMES DE LACEY, Defendant in Error.

Know all men by these presents that we, the said Northern Pacific Railway Company, a corporation created and organized under and by virtue of the laws of the State of Wisconsin, the above-named plaintiff in error, by James B. Kerr, its counsel, for the said Northern Pacific Railway Company, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the above-named James De Lacey, defendant in error, in the sum of five hundred dollars ($500.00), lawful money of the United States, to be paid to the said James De Lacey, his

executors, administrators, and assigns; to the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

The conditions of the above obligation are such that—

Whereas heretofore, to wit, on the 28th day of May, 1896, judgment was entered in the circuit court of the United States for the district of Washington, western division, on motion of attor-
129 neys for the defendant, dismissing the above-entitled action; and

Whereas, subsequent to the entry of said judgment of dismissal, the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company, sued out a writ of error in the United States circuit court of appeals for the ninth circuit to the United States circuit court for the district of Washington, western division, to reverse the said judgment in the said circuit court of the United States for the district of Washington, western division; and

Whereas, by an order made by said United States circuit court for the district of Washington, western division, on the 21st day of October, A. D. 1896, and entered in said cause on the said 21st day of October, A. D. 1896, the Northern Pacific Railway Company was substituted as plaintiff in the above-entitled action in the place and stead of the said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company; and

Whereas thereafter and on the 8th day of February, A. D. 1897, the said United States circuit court of appeals for the ninth circuit entered its judgment affirming the said judgment of the 28th day of May, 1896, of the said United States circuit court for the district of Washington, western division; and

Whereas the said Northern Pacific Railway Company, substituted as plaintiff herein in the place and stead of the said Northern Pacific Railroad Company and Thomas F. Oakes, Henry C.
130 Payne, and Henry C. Rouse, as receivers of the said Northern Pacific Railroad Company, has prosecuted a writ of error in the United States Supreme Court to the United States circuit court of appeals for the ninth *district* to reverse said judgment rendered by the said United States circuit court of appeals herein under date of February 8, 1897, affirming said judgment of the circuit court of the United States for the district of Washington, western division, rendered under date of May 28, 1896, dismissing the above-entitled action:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railway Company shall prosecute said writ of error to effect and shall cause to be paid all costs that may be awarded by said Supreme Court of the United States against the said Northern Pacific Railway Company or against any

of the above-named plaintiffs in the above-entitled action by reason of said writ of error, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

In witness whereof the parties hereto have hereunto set their hands and seals this 12th day of June, A. D. 1897.

NORTHERN PACIFIC RAILWAY COMPANY,
By JAMES B. KERR, *Its Counsel.*
AMERICAN SURETY COMPANY OF NEW YORK,
By THOS. B. SCOTT,
Resident Vice-President.
[SEAL.] ARTHUR M. WICKWIRE,
Acting Resident Assistant Secretary.

In presence of—
E. S. EDGERTON.
A. B. C. DURFEE.

Registered for American Surety Co. of N. Y. by Northern Exchange bank, St. Paul, Minn., by A. M. Du Bord.
131 M. & E.

STATE OF MINNESOTA, } ss:
County of Ramsey, . }

Be it remembered that on the 12th day of June, A. D. 1897, before me personally appeared Thomas B. Scott and Arthur M. Wickwire, to me personally known, who, being by me severally sworn, say: The said Thomas B. Scott says that he is the resident vice-president of the American Surety Company of New York, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Arthur M. Wickwire says that he is the acting resident assistant secretary of said company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors.

And the said Thomas B. Scott and the said Arthur M. Wickwire each acknowledge the said instrument to be the free act and deed of said corporation.

[SEAL.] LOUIS H. TEXLER,
Notary Public, Ramsey County, Minnesota.

Approved by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 339. United States circuit court of appeals, ninth circuit. Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey, defendant in error. Bond on writ of

error. Filed July 3, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

132 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY (Substituted for Northern Pacific Railroad Company *et al.*), Plaintiff in Error,
v.
JAMES DE LACEY, Defendant in Error. } No. 339.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and thirty-one pages, numbered from one to one hundred and thirty-one, both inclusive, to be a true copy of the record and of the assignment of errors, including the judgment filed, and of all proceedings in the above-entitled case, as the same appear of record in said circuit court of appeals, and that the same constitute the return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 28th day of July, 1897.

F. D. MONCKTON, *Clerk*.

133 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railway Company (substituted for The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of said Northern Pacific Railroad Company), plaintiff in error, and James De Lacey, defendant in error, a manifest error hath happened, to the great damage of the said The Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

134 [Endorsed:] Dock. 339. United States circuit court of appeals for the ninth circuit. Northern Pacific Railway Company, plaintiff in error, *v.* James De Lacey, defendant in error. Writ of error. Filed July 3d, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

135 UNITED STATES OF AMERICA, *ss:*

To James De Lacey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 23d day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

136 [Endorsed:] Dock. No. 339. United States circuit court of appeals for the ninth circuit. The Northern Pacific Railway Company, &c., plaintiff in error, *v.* James De Lacey, defendant in error. Citation. Filed July 13th, 1897. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

On this seventh day of July, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared M. H. Palmer before me, the subscriber, W. L. Sahse, a notary public in and for the State of Washington, residing at Tacoma, in said State, and makes oath that he delivered a true copy of the within citation to Homer F. Norris, one of the attorneys of record for the defendant in error herein.

M. H. PALMER.

Sworn to and subscribed the 7th day of July, A. D. 1897.

{ Seal of W. L. Sahse, Notary Public, State of Washington. Expiration of Commission, Jan. 8, 1899. }

W. L. SAHSE,
Notary Public.

Endorsed on cover: Case No. 16,655. U. S. circuit ct. of appeals, ninth circuit. Term No., 154. The Northern Pacific Railway Company, plaintiff in error, *vs.* James De Lacey. Filed August 21st, 1897.